92-2048

No. _____

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Supreme Court, U.S.
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IN THE
Supreme Court Of The United States
October Term 1992

PAT S. HOLLOWAY, ROBBIE HOLLOWAY, AND
FLOJO TRADING CORPORATION,
Petitioners,
v.

JANE H. BROWNING, MICHAEL G. STARNES, ET AL.,
Respondents.

On Petition For Writ Of Certiorari
To the Court of Appeals
For the Fifth Judicial District
of Texas at Dallas

JOINT PETITION OF PAT S. HOLLOWAY AND ROBBIE HOLLOWAY FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Due Process Clause of the 14th Amendment void a state court judgment when the uncontroverted summary judgment record establishes that the trial judge obtained a direct financial benefit of more than $100,000.00 from his judgment, was patently biased, conspired throughout the trial with the prevailing plaintiffs and their attorneys, and that his judgment was the product of what the Fifth Circuit has characterized as a "corrupt abuse of the judicial process" and a "fraud on the court"?

2. When a federal judgment dismissed all of Petitioner's pendent state law claims expressly "without prejudice" to the refiling thereof in the Texas courts on the grounds that they "should be heard in the state courts" and that "an adequate state court forum is available", can the Texas courts then determine, consistent with the Supremacy Clause, and the federal law of res judicata, that such federal judgment has barred all of the refiled state claims?

3. When the federal district court *abstains* "in favor of the Courts of the State of Texas" from deciding any of Petitioners' federal or state constitutional claims, ruling specifically that "no state court remedies ... have been foreclosed by this Court", can the Texas courts then determine, consistent with the Supremacy Clause, and the federal law of res judicata, that the federal court has foreclosed and barred all of such claims?

LIST OF PARTIES, AND AFFILIATED CORPORTIONS, IN THE COURT OF APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

APPELLANTS/PLAINTIFFS IN THE TRIAL COURT

Pat S. Holloway
Robbie Holloway
Flojo Trading Corporation
Humble Exploration Company, Inc. (now HECI Exploration Co.)
Sterling Pipeline Company

APPELLEES/DEFENDANTS IN THE TRIAL COURT

Jane H. Browning, individually and as co-executrix and co-trustee of the estate of William W. Browning, Jr., deceased
Michael G. Starnes, individually and as co-executor and co-trustee of the estate of William W. Browning Jr., deceased, and as co-trustee of the Browning Childrens Trust.
William W. Browning, III
Kathryn Browning
Averille Browning
Fallon Browning
Robert Browning
Browning Oil Company

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JOINT PETITION OF PAT S. HOLLOWAY AND ROBBIE HOLLOWAY FOR WRIT OF CERTIORARI

Petitioners Pat S. Holloway and Robbie Holloway respectfully pray for a writ of certiorari to the Court of Appeals for the Fifth Judicial District of Texas at Dallas.

OPINION BELOW AND STATEMENT OF JURISDICTION

The judgment of the Dallas Court of Appeals was entered, and its opinion filed, on June 30, 1992; the opinion is reported in 840 S.W.2d 14, and is reprinted in the Appendix at page 1a. Motions for rehearing in the Court of Appeals were denied on August 27, 1992 (Appendix, p.24a).

Applications for Writ of Error to the Supreme Court of Texas were denied on February 10, 1993 (Appendix, p. 25a) and Motions for Rehearing in the Supreme Court of Texas were overruled on March 24, 1993 (Appendix, p. 28a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

ARTICLE VI, Clause 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

AMENDMENTS, ARTICLE XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Following the unprecedented dismissal of their properly filed state court appeals,[1] Petitioners Pat S. Holloway ("Holloway") and his former wife Robbie Holloway ("Robbie") (collectively the "Holloways") brought this combined equitable bill of review and collateral attack in the state district court in Dallas to set aside a judgment by former Dallas District Judge Dee Brown Walker (the "Walker Judgment") in the prior case of *Jane H. Browning, et al. v. Pat S. Holloway, et al.* (the "Browning Case"). In *Holloway v Fifth Court of Appeals at Dallas*, 767 S.W.2d 680, 683 (Tex. 1989), the Supreme Court of Texas recognized the Holloways' right to maintain the present action notwithstanding the dismissal of their appeals, ruling that such dismissal was not a judgment "on the merits" such as is required for res judicata to apply.

Both in their petition in the present case and in their first motion for summary judgment, the Holloways asserted that the Walker Judgment was void under the due process clauses of both the United States Constitution and the Texas Constitution because of the financial interest and bias of Judge Walker.

In the original Browning Case the Respondents here, the Brownings, had sued the Holloways and Holloway's companies, Humble Exploration Company, Inc.("Humble") and Sterling Pipeline Company ("Sterling") for damages and

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[1] *Humble Exploration Company, Inc. v. Browning*, 677 S.W.2d 111 (Tex.App.--Dallas 1984), *dism'l reinstated* 690 S.W.2d 321 (Tex.App.---Dallas 1985, writ ref'd n.r.e.) (en banc), *cert. denied* 574 U.S. 1065 (1986).

constructive trust based on fraud and breach of fiduciary duty. After the Brownings sought a receivership, the Holloways and Humble filed for bankruptcy, and removed that case to the bankruptcy court.

There the parties entered into a Stipulation and Agreement which was incorporated in three agreed, final federal judgments and orders. These provided for the remand of the Browning Case to the state court upon the conditions and agreements that (1) the Browning Case would be tried before a retired or visiting state court judge, (2) "pending the trial" the Brownings would seek no receiverships, (3) "full rights of appeal" would be "preserved" to both sides, and (4) "no execution" would issue on any judgment, which would be enforced "only in the bankruptcy court." (The Brownings subsequently dishonored all these provisions of the Stipulation and Agreement and agreed federal judgments. The Brownings did not try their case before a retired or visiting judge, "pending the trial" they obtained a series of five (5) illegal receiverships, they obtained the dismissal of the defendants' appeal, and they obtained an "order for immediate execution" of their judgment which forced Petitioners into Chapter 7 bankruptcy.)

Following remand, the Browning Case was tried by active local Dallas Judge Walker over the strenuous objections of the defendants. These included a contested hearing before the local presiding administrative judge who, ruled that Judge Walker could not hear the case (which Judge Walker "overruled"), and an attempted mandamus proceeding against Judge Walker filed by the defendants in the Supreme Court of Texas (which it declined to entertain).

Judge Walker tried the Browning Case within a series of receivership proceedings he imposed on the defendants in

violation, not only of the federal Stipulation and Agreement and agreed federal judgments, but also of Texas law.[2]

At the conclusion of trial, Judge Walker entered judgment *non obstante veredicto* against the defendants. He imposed constructive trusts over all their assets, including the Holloways' residence in Dallas, their farm and home near Giddings, Texas, all of Holloway's inherited family property, and all of Robbie's separate property acquired subsequent to her divorce from Holloway.

Holloway's first and sixth motions for summary judgment in the present case, which Robbie adopted and urged, include (1) 10 supporting affidavits stating facts which clearly disqualified Judge Walker under the Due Process Clause; (2) portions of a federal deposition of Judge Walker containing admissions which disqualified him; (3) a verified and undisputed court reporter's transcription of a "confidential" agreement between Judge Walker and Jane Browning *et al.*; (4) a verified and undisputed court reporter's transcription of another *ex parte* meeting between Judge Walker and the Brownings' attorneys in which they plotted how to maintain their control over the defendant Humble in defiance of two successive opinions and orders of the appellate court; (5) a written argument by Judge Walker himself on behalf of the Brownings' position which he admitted he personally wrote and filed in the court of appeals, wherein he refers to his "personal rights" in the case; and (6) the entire trial

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[2] *Humble Exploration Company, Inc. v. Fairway Land Company*, 641 S.W.2d 934 (Tex.App.--Dallas 1982, writ ref'd n.r.e.); *Humble Exploration Company, Inc. v. Hon. Dee Brown Walker*, 641 S.W.2d 941 (Tex.App.--Dallas 1982, no writ).

record in the Browning Case and the Fairway Receivership proceeding within which the Browning Case was actually tried.

The Brownings have never filed, either in the present case or in any of the other federal and state proceedings in which the same summary judgment affidavits have been filed, any controverting affidavits, either by any of them or by any of their attorneys, controverting or denying any of the facts in any of the Holloways' 10 summary judgment affidavits which are set forth below and in the separate petition filed in this cause by Flojo Trading Corporation.

Instead, the Brownings have filed in this case and in other proceedings only a self-serving, evasive, argumentative, conclusory affidavit by former Judge Walker himself. It does not controvert any of the specific facts set forth below in this petition. Petitioners rely on the following uncontroverted facts, and those set forth in the separate petition filed in this cause by Flojo Trading Corporation, to establish the financial interest and bias of Judge Walker which render the Walker Judgment void under the Due Process Clause.

1. *Judge Walker Unlawfully Took Nearly $100,000.00 Out Of Holloway's Company Humble And Paid It To His Personal Lawyers And Accountant Then Working For Him Without Further Compensation In Other, Unrelated Matters.*

During the unlawful receivership proceedings[3] within which the Brownings were trying their claims against

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[3]*See* n.2 *supra*.

Humble, Sterling and the Holloways, Judge Walker took more than $98,000.00 out of Humble and paid it to his personal lawyers John Wright and Whitley Sessions, and to his personal accountant J. R. Hurt. *1982 Tr. VIII:1229; IX: 1257 and 1385; XII:1961; XVI:2411; XVII: 548; XVII:2583; XVIII: 2601, 2608, 2634 and 2644.*

All three of these individuals were then working for Judge Walker in other, unrelated matters. They received no other payment for their work on such matters for Judge Walker personally beyond the payments he made to them out of the defendant Humble through the mechanism of his unlawful receiverships over that company. *Tr. III:535-44, 548-9, 592, 620.*

These individuals performed no services for the benefit of Humble to justify the payments Judge Walker made to them out of it. Instead, they worked on behalf of the Brownings (*Tr. II:456-7 and 471-2*), and testified **for** the Brownings **and** Judge Walker **against** Humble and the other defendants.

Thus, Judge Walker's personal accountant J. R. Hurt testified to the jury for the Brownings, but as Judge Walker's own expert witness against the Humble=Holloway defendants. Judge Walker designated Hurt as his own expert witness against the defendants when they pointed out to him that the Brownings had failed to designate Hurt as one of their expert witnesses as required by the rules; and Judge Walker repeatedly advised the jury that Hurt was Judge Walker's own expert witness, testifying on behalf of the Brownings *and him* against the defendants. *1982 S.F. 2077* and *2134.*

At the time of trial of the Browning Case, Judge Walker was being personally represented without compensa-

tion (other than payments from Humble) in at least two other legal matters by (1) G. H. Kelsoe of Kelsoe & Ayres, the Brownings' attorneys, (2) John Wright, appointed by Judge Walker as the Brownings' receiver over Humble and the Holloways, and (3) Whitley Sessions, appointed by Judge Walker as the attorney for the Brownings' receiver.

One of these legal matters was the ongoing sexual harassment proceedings brought against Judge Walker by Sheila Porter, the librarian of the Dallas County Law Library whom Walker had discharged. Judge Walker had been Chairman of the Library Committee; Whitley Sessions had been its Vice-Chairman; and G.H. Kelsoe and John Wright were members of the Committee. *Tr. III:533-4.* Sheila Porter charged that Committee Vice-Chairman Sessions had complained to her that "the Judge [Walker] was accustomed to making library decisions wrapped in the arms of the librarian, and he was dissatisfied because he didn't get to do that." *Tr. III:547.* Kelsoe, Wright and Sessions were all representing Judge Walker in the Sheila Porter matter without payment of any kind. *Tr.III:535-44, 548, 549.* "It's all free for love," said Judge Walker. *Tr.III:548.* This matter continued through the trial of the Browning Case, until the following year. *Walker Dep. at 63.*

Another then ongoing legal matter involving Judge Walker, Kelsoe and Wright was the *Williams* case. That was a personal foray by Judge Walker to (1) punish other Dallas trial judges by re-allocating their court quarters, (2) enjoin the Dallas Court of Appeals from enlarging its quarters, and (3) deprive the Dallas Bar Association, which had held the first hearing in the Sheila Porter matter, of its recently-asserted control over the large county law library funds previously controlled by Judge Walkers and his cronies involved with him in the Browning Case.

Judge Walker recessed the jury in the Browning Case in order to allow "my lawyer" Kelsoe to argue before the Eastland Court of Appeals in support of Judge Walker's orders in the *Williams* case. *Tr.II:474, ¶ 16.* As shown by the reported appellate opinions, both Kelsoe and Wright argued unsuccessfully, in both the court of appeals and in the Supreme Court of Texas, to uphold Judge Walker in that lawsuit. See *County Commissioners' Court of Dallas County v. Williams*, 638 S.W.2d 218,220 (Tex.App.--Eastland 1982, writ ref'd n.r.e. 655 S.W.2d 206 (Tex. 1983). Judge Walker admitted he never paid either Kelsoe or Wright for any of their legal services, either in this case or to defend him personally in any of the other federal and state lawsuits in which they had represented Judge Walker personally. *Tr.III:592, 548.*

At the time of trial of the Browning Case, J. R. Hurt was and had been for a number of years Judge Walker's personal accountant, preparing his personal income tax returns and performing other accounting services for Judge Walker, always without any payment by Judge Walker. *Tr. III:620.*

So, Judge Walker appointed Hurt as his Receiver's accountant in the unlawful Humble receiverships, and paid him substantial sums out of Humble by *ex parte* orders. Then Judge Walker refused to vacate these payment orders even after being ordered to do so three times by the court of appeals. Hurt rendered no services whatever for the benefit of Humble. *Tr. II:471-3.* Instead, Judge Walker, in the presence of the jury, repeatedly designated Hurt as his own expert witness to testify for him and the Brownings against the Humble-Holloway defendants. *1982 S.F. 2077 and 2134.*

The defendants, while not allowed to present any expert witnesses of their own, were thus required to pay for the expert witness whom Walker designated as his own expert to testify for him and the Brownings against the defendants.

2. *Judge Walker Privately Hired His Own Personal Lawyer To Represent Him Against the Defendants In The Browning Case, Then Paid Such Personal Lawyer Out Of The Funds Of The Defendant Humble, Holloway's Company, On The Same Day He Transferred Humble From Holloway To The Brownings By His Judgment.*

Judge Walker privately hired, as his own personal lawyer in the Browning Case, former Dallas District Judge Robert H. Hughes. *Uncontroverted Affidavit of Judge Robert H. Hughes, Tr. II:446.*

Then Judge Walker discharged his personal obligation to his personal attorney Hughes for his services by paying him, not out of his own personal funds, but instead out of the funds of the defendant Humble. Judge Walker did this by *ex parte* order on the very same day he entered his first judgment *n.o.v.* stripping Holloway of his ownership of Humble. *Tr.II:447 ¶ 6; 1982 Tr.IX:1379 and X:1421.*

Judge Walker, by entry of such judgment, thereby protected himself personally from any reimbursement liability for discharging his personal obligation to his own attorney out of the funds of the defendant Humble through his unlawful receivership over it, all by payment orders in a receivership which had already twice been ordered to be vacated by the appellate court.

In Judge Walker's affidavit filed in the present case, he admits he hired Judge Hughes, and he admits he paid him his fees out of Humble's funds. *Tr.III:675*. He does not even claim that there was any statute, or court rule, or case law, or motion, or hearing, or court order authorizing him to hire Judge Hughes which could lend even any color to the Brownings' argument that Judge Walker must have been acting in some official judicial capacity, rather than in his personal capacity, when he privately hired Judge Hughes to represent him as his personal lawyer against the defendants in the Browning Case.

3. *In Mid-Trial Judge Walker By Ex Parte Order Deprived The Defendants Of Their Attorneys, Their Accountants, All Their Trial Files, All Their Evidence Files, All Their Other Documentary Evidence, Their Business Records And Their Fact Witnesses.*

Just as the Humble-Holloway defendants were about to commence the presentation of their side of the case to the jury, Judge Walker entered an *ex parte* order which deprived them of their only lawyers familiar with the case, all their legal trial files, all their lawyers' evidence files, all their other documentary evidence, all their accountants, all their business records and their fact witnesses, the remaining Humble employees. The entirely uncontroverted affidavit of William J. Albright, Humble's Assistant General Counsel, includes the following:

> 13. On or about July 27, 1982, I was summoned by Whitley Sessions or some other representative of Wright to appear at the courthouse under the pretense that a status meeting had been called by Wright to discuss ongoing Humble business . . . Upon my arrival I searched for, but was unable to locate Wright. Instead, I was instructed to wait in the hall

> outside Walker's courtroom. Shortly thereafter, I was served with a copy of an order signed by Walker. Under the terms of the order, [General Counsel] Ashworth, [C.P.A.-Comptroller] Holt, Holloway, [C.P.A.-Attorney] Swank, [C.P.A.] Lovett and I were suspended from employment at Humble without pay and were restrained and enjoined from entering the office of Humble. The entry of this order, which was without notice or a hearing, closely coincided with the completion of the Brownings' case-in-chief and the commencement of Humble's defense. It operated to prevent [General Counsel] Ashworth and me from gaining access to our litigation files located at the Humble office, including specifically those described above in which I had compiled the evidentiary support for defenses to the BCT Trust Opportunity claim. The order further operated to prevent Ashworth and me from having the opportunity to review Humble records and to confer with knowledgeable Humble employees concerning the contents of such records, which were needed for the defense of the claims raised by the Brownings. The order further operated to prevent Ashworth and me from having the opportunity to present such records to Holloway and to confer with him as to the contents of such records. During the presentation of Humble's defense, neither Ashworth nor I were able to reconstruct the information set forth in such files. As a result of this order, much of the information which was critical to Humble's defense was not presented at trial, and does not appear in the record of such proceedings.

Tr.II:457-8; see also id. at 473, ¶ 14. Then Judge Walker refused to give any explanation or justification for his *ex parte* order. He would not even allow Humble's entirely

unprepared trial counsel (*Tr.II:470*) to question Receiver Wright or his attorney Sessions about the reasons or grounds for the *ex parte* order. Counseled by Judge Walker, both refused to answer any questions. *Tr.I;104-6; see also Tr. II;471, ¶10.*

4. *Judge Walker Refused To Allow The Defendants To Present Any Expert Witnesses But He Allowed All Expert Testimony Offered By The Brownings, And He Designated His Own Expert Witness To Testify For Him And The Brownings Against The Defendants.*

After capturing the Browning Case which had been set for trial 4 months later before a retired judge in accordance with the federal Stipulation and Agreement, Judge Walker set it for trial in his own court on only *12* days' advance notice to the defendants. *1982 Tr. 1092.* Then he refused to allow the defendants to present any expert witnesses, on the ground that they had failed to give the required *14* days' notice thereof prior to trial, a physical impossibility under the circumstances. *1982 S.F. 3006, 3010, 3311, 2602-4.* But then Judge Walker waived the 14-day notice requirement for the Brownings to allow two undisclosed and undeposed witnesses to testify as experts for the Brownings, Felix McKnight and Judge Walker's personal accountant J. R. Hurt. *See 1982 Tr. 26, 50, 63 and 81* (Brownings' list of experts did not include McKnight or Hurt). Hurt testified as Judge Walker's own expert (1982 S.F. 2077 and 2134) for the Brownings and him against the defendants at interminable length, (*1982 S.F. 2062-2719*), as did McKnight. *1982 S. F. 807 et seq.*

5. *Having Deprived the Defendants of their Expert Witnesses, Fact Witnesses, Attorneys, Trial Files, Documentary Evidence, Accountants and Business Records, Judge Walker Then Allowed The Brownings*

To Continue To Conceal Their Own Records And Evidence Which Would Have Disproved Their Claims.

At trial Judge Walker refused to require the Brownings to produce as demanded the accounting or financial records of the $30,000 Browning Childrens' Trusts (the "BCT"). *1982 S.F. 644-6*. The Brownings had alleged that Holloway was a "thief" and had "embezzled" from the BCT. *Tr. II:326*. Yet Judge Walker allowed the Brownings to continue to conceal the financial and accounting records that would have disproved such charges. In the 14 years since this litigation commenced the Brownings have never produced any audit of their own $30,000 BCT from which they claim Holloway stole and embezzled. Nor have they ever allowed Holloway to conduct an independent audit. There still never has been any audit by anyone.

The Brownings did not deny or controvert any of the following assertions in the court below by Robbie, who was Holloway's bookkeeper and secretary, as well as wife, during the time period involved: (1) that Holloway never in fact stole or embezzled anything from the BCT; (2) that he never even took one penny of trustee's fees, attorney's fees or any other compensation from the BCT; (3) that he was never even reimbursed for all of his out-of-pocket expenditures on behalf of the BCT; (4) that the leases he bought for the BCT for less than Thirty Thousand Dollars ($30,000.00) have actually produced oil and gas revenues of more than Thirty Million Dollars ($30,000,000.00); and (5) that Holloway's company Humble was never repaid any of the advances it made to the BCT at Holloway's direction when Jane Browning, after Bill Browning's death, refused to make any additional contribution to the BCT vitally needed to complete the purchase of the oil and gas lease block which

so greatly enriched the already-rich Browning "Children" (even before they obtained all the spoils of the Walker Judgment).

6. *G. H. Kelsoe, The Brownings' Lawyer, Was Judge Walker's Business Associate At The Time Of Trial, And Had Represented Him Free Of Charge In A Federal Lawsuit*

At the time of the Browning Case Judge Walker, Kelsoe and Wright maintained joint financial control, by Judge Walker's co-signature with either Kelsoe or Wright on the checking account, over the funds of their organization described in the next section. *Tr.III:558-9.* Judge Walker and Kelsoe had also jointly incorporated a cemetery association, the articles of incorporation of which were prepared by Kelsoe from a form supplied by Judge Walker. *Tr.III:601.*

Judge Walker admitted that Kelsoe had been his personal friend, personal attorney, and campaign manager since 1956 *(Tr.III:525)*, and had represented him free of charge in a federal lawsuit brought against him. *Tr. III:591.*

7. *At The Time Of Trial Of The Browning Case Judge Walker Had An Ongoing Financial And Professional Association With Kelsoe & Ayres, John Wright, Whitley Sessions, and J.R. Hurt.*

Judge Walker admitted that after he and his cronies involved in the Browning Case lost control of the Library Committee and all its large funds, he, G.H. Kelsoe, Kelsoe's son Robert L. Kelsoe, Ayres, Wright, Sessions and Hurt had then organized the "Dallas *County* Bar Association" (not to be confused with the long-established Dallas Bar Association). The idea for the new "bar association" originated at

a meeting of Judge Walker's Law Library Committee in November, 1980, *(Tr.III:552)*, a month before his term as Chairman was to expire in December. *Tr.III:549.*

G. H. Kelsoe's office was the registered office of the new bar association and he was the registered agent. *Tr.III:557.* The Brownings' attorney Kelsoe was the President, and the Brownings' receiver John Wright was the Secretary-Treasurer, of the new bar association. *Tr.III:55-7-8.* Membership certificates were kept in Judge Walker's office, his court reporter typed up the certificates, and new members were notified by Wright to pick up their certificates at Judge Walker's court. *Tr.III:560-1.*

All membership certificates were issued by Judge Walker, *Id.* He testified that memberships were sold to lawyers. *Tr.III:564.* Judge Walker himself solicited memberships from the attorneys who appeared in his court. *Id.* The money collected from the sale of memberships and from the dues were kept in a "checking account across the street at the little bank by the courthouse" *(Tr.III:559)* on which Judge Walker co-signed checks with either Kelsoe or Wright. Whitley Sessions, the attorney for the Brownings' receiver, had always been a director, and J.R. Hurt, the personal accountant for both Judge Walker and Sessions (and the Walker-Browning expert witness) helped with the accounting and the I.R.S. *Tr. III:566.*

Judge Walker, Ayres, Kelsoe, Wright, Sessions and Hurt were all involved in their jointly organized "bar association" at the time of the Browning Case in 1982. *Tr.III:569--71.* Judge Walker did not know whether the bar association had a minute book. *Id. at 533.* But he knew where they kept their money *Tr.III:539)*, jointly controlled by Walker, Kelsoe and Wright. *Id.*

The district court in the present case sustained the Brownings' motion for summary judgment based on federal res judicata, and denied Petitioners motions for summary judgment based on the facts summarized above and asserting the voidness of the Walker Judgment under the due process clauses of the federal and state constitutions because of the disqualification of Judge Walker.

On appeal, the Dallas Court of Appeals affirmed. It ruled that all of Holloway's state constitutional claims were barred under the federal law of res judicata by virtue of the dismissal of the civil rights action of *Holloway v. Walker*. In that §1983 action, all of Holloway's pendent state claims, which included a claim that the Walker Judgment was void under the Texas constitution, were dismissed expressly without prejudice, a ruling specifically approved by the Fifth Circuit. See *Holloway v. Walker*, 784 F.2d at 1294.

Robbie was not a party in *Holloway v. Walker*. Therefore, it could not be claimed the judgment in that case was a res judicata bar to her prosecution of either her federal or state constitutional claims in the present case. But the Dallas Court of Appeals ruled that all of Robbie's federal and state constitutional claims were barred under the federal law of res judicata by the federal enforcement action of *Browning v. Navarro* in which she *was* a party. In that action the federal court had abstained in favor of the courts of the State of Texas from adjudicating any of the constitutional claims asserted there and in the present case, exempting from its abstention order only the single bankruptcy law

issue which had been ruled on at that time by the federal courts.[4]

REASONS FOR GRANTING WRIT

Because this notorious litigation involves the integrity of the judicial process itself, it goes to the very heart of our system of government. The facts established by the uncontroverted summary judgment record in the present case constitute what the Fifth Circuit, faced with only **some** of the facts shown by the record in the present case, has characterized as "a corrupt abuse of the judicial process".[5]

The other issues presented here, of the effect required to be given by state courts to federal court abstention orders and dismissals "without prejudice," are issues of general importance that constantly present themselves on a daily basis in our bifurcated judicial system. This Court, although consistently requiring state courts to honor federal judgments, has not articulated consistently the constitutional and legal bases of such requirement.[6]

Also, because this particular case is the product of a bizarre and convoluted series of interfacings between the lower federal courts and the Texas appellate courts, all resulting in the denial of any state or federal review of the

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[4] *See Browning v. Navarro*, 37 B.R. 201 (N.D. Tex. 1983) *rev'd Browning v. Navarro* 743 F.2d 1069 (5th Cir. 1984).

[5] *Browning v. Navarro II*, 826 F.2d 335, 345-346 (5th Cir. 1987).

[6] *See* Degnan, *Federalized Res Judicata*, 85 Yale L.J. 741 (1976); Wright, Miller & Cooper, *Federal Practice and Procedure*, Vol. 18 § 4468, pp. 648-649 (1981).

merits of a huge, patently unconstitutional and grossly unjust judgment, this Court's decision of the case is merited.

The lands covered by the oil and gas leases transferred to the Respondents by the infamous Walker Judgment contain recoverable oil and gas reserves valued at more than one billion dollars, in addition to the more than $500,000,000.00 worth of hydrocarbons already produced to date. Because of the value of the properties involved, the prior notoriety of Judge Walker, and the widespread publicity concerning Judge Walker's conduct in the trial of the Browning Case, this litigation has been discussed wherever lawyers congregate and wherever oil men meet (which is everywhere in the world). Also, this litigation has directly affected literally thousands of landowners and royalty owners and hundreds of oil companies, service companies and individuals contractually connected with the corporate defendants in the Browning Case.

I. The decision of the Texas court of appeals conflicts with decisions of this Court regarding the preclusive, res judicata effect of federal court dismissals without prejudice and abstentions, and thereby conflicts with the Supremacy Clause of the United States Constitution and the federal law of res judicata.

This Court consistently has held that the dismissal of claims "without prejudice" or "on any ground which did not go to the merits" is not a res judicata bar to another action on those claims. *See Costello v. United States*, 365 U.S. 265, 286 (1961), quoting *Hughes v. United States*, 71 U.S. (4 Wall.) 232, 237 (1986); *Swift v. McPherson*, 232 U.S. 51, 56 (1914); *Baxter v. Buchholz-Hill Trans. Co.*, 227 U.S. 637, 638 (1912)(Holmes, J.)("without prejudice"); In that regard, the circuit courts of the United States appear to be

uniformly of the view that a dismissal of state claims based on the refusal of a federal court to exercise its pendent jurisdiction is not a decision on the merits and therefore has no subsequent preclusive effect.[7]

Likewise, this Court has held repeatedly that, "a dismissal on the grounds of abstention so as to permit a state court to pass on an issue of state law *must not be with prejudice*. *A.T.L.A. v. New Jersey Supreme Court*, 409 U.S. 467, 469 (1973)(citations omitted)(emphasis added). This general principle has been echoed more recently by the Fifth Circuit. *DuBroff v. DuBroff*, 833 F.2d 557, 563 (5th Cir. 1987)

In this case the Texas court of appeals determined that the Holloways' state claim for a bill of review was precluded by res judicata due to the prior federal court litigation with Respondents in the § 1983 action (*Holloway v. Walker*) and the bankruptcy enforcement action (*Browning v. Navarro*). The court of appeals disregarded the crucial fact that in the § 1983 action, to which Robbie was not a party, the court declined to exercise its pendent jurisdiction over Holloway's state law claims and dismissed them expressly without prejudice. Appendix at 38a-42a . The court of appeals also disregarded the fact that in the bankruptcy enforcement action the bankruptcy court had abstained from determining either the federal or state law claims which were presented to it. Appendix at 52a-56a, 57a-59a .

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[7] *See Nilsen v. City of Moss Point, Mississippi*, 701 F.2d 556, 562-563 (5th Cir. 1983)(en banc); *Gregory v. Mitchell*, 634 F.2d 205, 206-207 (5th Cir. 1981); *Management Investors v. U.M.W.*, 610 F.2d 384, 395 (6th Cir. 1979); *Graf v. Elgin, J. & E. Ry. Co.*, 790 F.2d 1341, 1347 (7th Cir. 1986).

The §1983 action of *Holloway v. Walker* asserted that the Walker Judgment was void under the Due Process Clause of the 14th Amendment. In Holloway's amended complaint in that case he also "invoke[d} the pendent jurisdiction of this Court to consider [his] state law causes of action which arise out of the same common nucleus of operative facts that have given rise to [his federal claim]".[8] In Count Six of this amended complaint, Holloway expressly adopted the same factual allegations as he made under the federal § 1983 claim in Count one (para. 1-153) of the complaint. Under both the federal law and the state law previously invoked, Holloway sought in Count Six, and prayed for both there and at the end of his complaint, a declaratory judgment that the Walker Judgment was "void".[9]

The federal district court, in dismissing Holloway's federal claims *with prejudice*, stated the following;

> "Without expressing an opinion on the merits of the allegations in this case...[s]uch claims are better relegated to the normal corrective processes of the state courts."

Appendix p. 40a. The district court, in the same order, declined to exercise jurisdiction over the pendent state claims, and dismissed them *without prejudice* with the following language:

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[8]Appendix p. 35a ; Brownings' Amended Motion for Summary Judgment, Vol. I, Ex. 89, p.7 ¶4.

[9]Appendix p. 36a-37a ; *id.* p.60, ¶192 and p.63, ¶2.

"Pendent Claims

Plaintiffs also assert several pendent claims....

The court is of the opinion that the viable pendent claims, if any, should be heard in the state courts. The ultimate decision of the ownership of the property underlying the claims will eventually come from the state courts....No motions addressed to the substance of the pendent claims have been filed or considered by this Court. An adequate state forum is available,

* * *

Accordingly...Plaintiffs' claims under 42 U.S.C. §1983 are DISMISSED WITH PREJUDICE; and Plaintiffs' pendant claims are DISMISSED WITHOUT PREJUDICE TO THE TIMELY REFILING OF SAME IN STATE COURT.

Id.

The matter over which the bankruptcy court abstained was a state court petition in the case styled *Jaehne v. Starnes*, removed by Respondents, which alleged, *inter alia*, the voidness of the Walker judgment as a matter of 14th Amendment Due Process as well as other grounds. Appendix at 49a *et seq* . Upon being presented with a copy of said petition, the federal district court presiding over *Browning v. Navarro* twice abstained "in favor of the courts of the State of Texas" with respect to all claims and issues involving the validity of the Walker Judgment other than the one federal bankruptcy law issue it had already decided (and which the Fifth Circuit had reversed). The district court ruled as follows:

> Resolution of the issues raised by Holloway in *Jaehne* regarding conflicting title may be an arduous and lengthy process involving parties beyond those involved in the instant suit.....Accordingly, this Court hereby ABSTAINS in favor of the courts of the State of Texas from the resolution of any issues regarding the identity of or conflicting claims of title to assets subject to a constructive trust by the [Walker] Judgment....
>
> ...To the extent that there are disputes as to the identity of or conflicting claims to any such property, the claimants may proceed in a court of competent jurisdiction to adjudicate title to said property in the possession of Plaintiffs.

Appendix p. 54a-55a . In this opinion and order dated June 28, 1985, the federal district court also ruled, in response to Holloway's request, that "no state court remedies for...whatever theories may be devised have been foreclosed by this Court." This was *after* the April 18, 1985 dismissal by the district court of *Holloway v. Walker* which the Dallas Court of Appeals wrongly has ruled also foreclosed all of Holloway's state court remedies.

By opinion and order dated July 16, 1985, the district court amended its abstention order to read as follows:

> Accordingly this Court will ABSTAIN in favor of the courts of the State of Texas from the resolution of any issues regarding conflicting claims to title to assets subject to a constructive trust by the [Walker] Judgment on the basis of claims other than those adjudicated in this Court by parties to this action"

Appendix p. 58a-59 . Concurrently with this ruling, *Jaehne v. Starnes* was remanded to the state district court.

It is, therefore, clear that the state law claim which the court of appeals held to be precluded on the basis of a prior opportunity to be heard was in fact dismissed without prejudice on both occasions. Both dismissals were affirmative decisions by the federal courts to not exercise jurisdiction over the state law claims presented. In that regard this Court "has long recognized that 'the principles of res judicata apply to questions of jurisdiction as well as to other issues'", *Underwriters' Nat. Asurr. v. N. C. Life & Acc.*, 455 U.S. 691,706 (1982), and "as well to jurisdiction of the subject matter as of the parties." *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 78 (1939).

In other words, the federal courts' refusal to exercise jurisdiction over the state law claims was an issue which had been adjudged preclusively and which the court of appeals was bound therefore to accept as controlling in its consideration of the issue before it. As such, the judgment of the Court of Appeals not only conflicts with the federal law of res judicata but also fails to give full and proper effect to the judgments of the federal courts.

A state court's disregard of federal judgments raises in turn a federal question. See *Stoll v. Gottlieb*, 305 U.S. 165, 167 (1938), and *Meyers v. International Trust Co.* 263 U.S. 64, 69 (1923). This Court has observed that the proper method of resolving that question is by requesting certiorari from the Court. *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 525 (1986). Whether a federal judgment has been given full faith and credit implicates the Supremacy Clause, because, " States cannot...vest state courts with power to violate the supreme law of the land." *Kalb v. Feurestein*, 308 U.S. 433, 439 (1940). As one judge of the

Third Circuit has observed, "The ultimate source for binding state courts to federal decrees is the Supremacy Clause...." *Delaware Valley Citizens' Council v. Commonwealth of Pennsylvania*, 755 F.2d 38, 46 (3rd Cir. 1985)(concurring opinion), *cert. denied*, 474 U.S. 819 (1985).

The Court therefore should grant certiorari in this cause and summarily correct the Court of Appeals' erroneous determination that the federal court judgments created a res judicata bar to the prosecution of the Holloways' state law claim and of Robbie's state and federal claims of Judge Walker's disqualification.

II. The decision of the Court of Appeals insulates from review and remedy a patently corrupt and void judgment, and thus conflicts with decisions of this Court concerning the Due Process Clause of the 14th Amendment.

By holding Holloway's state law claims and Robbie's state and federal law claims barred by res judicata, the Texas court of appeals became the most recent court to avoid dealing with the merits of Holloway's state constitutional claim and Robbie's state and federal claim that the Walker judgment was rendered by a trial judge who was so personally and financially involved with counsel and agents of Respondents that there is no question that he was constitutionally disqualified by virtue of both his financial interest in the case and his clearly exhibited bias against Petitioners. Although Holloway's state constitutional claim is not a matter for this Court, a determination by the Court that Robbie's 14th Amendment Due Process rights were violated would serve as a "floor"[10] supporting Holloway's state claim since the Texas Supreme Court has held that the

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[10] *Nelsen v. Krusen*, 678 S.W.2d 918, 921 (Tex. 1984).

Due Course of Law provision of the Texas Constitution affords greater rights and imposes higher standards than the 14th Amendment.[11]

Judge Walker had an undeniable financial interest in paying nearly $100,000.00 out of the funds of the defendant Humble to his own personal attorneys and personal accountant who had been, and were currently, performing unpaid legal and accounting services for him in other matters. And once Judge Walker had made these illegal payments to his personal attorneys and accountant out of Humble's funds through his unlawful receiverships, then he had an obvious interest in assuring that they not be required to disgorge the money they had received as ordered by the appellate court. A judgment against Holloway divesting him of his ownership of Humble was the only way to assure that result.

Judge Walker also had an undeniable financial interest in having the personal lawyer he privately hired to represent him against the Holloways in the Browning Case, former District Judge Robert H. Hughes, paid out of the funds of the defendant Humble instead of out of his own personal funds. And once Judge Walker did this, then he had an obvious interest in assuring that Holloway did not regain control of his company so as to be in a position to seek reimbursement from Judge Walker. A judgment against Holloway divesting him of his ownership of Humble was the only way to assure that result.

This Court has stated clearly that a substantial possibility of even an indirect financial benefit, *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), or the

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[11] *Sax v. Voteller*, 648 S.W.2d 661 (Tex. 1983); *Learoy v. Hanlon*, 713 S.W.2d 335 (Tex. 1986); see *Sun Exploration Co. v. Jackson*, 783 S.W.2d 202, 206 (Tex. 1990).

existence of an irregular and sporadic business relationship with a party, *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), is sufficient to result in the disqualification of a tribunal under the Due Process Clause of the 14th Amendment. The uncontroverted facts established in this cause show a direct, substantial, and obvious benefit flowing to Judge Dee Brown Walker because of his involvement in the original litigation, just as those uncontroverted facts show a regular, continuous personal and business relationship between Judge Walker and representatives of Respondents up to and through the trial of the original cause. Yet the merits of the claim of constitutional disqualification have never been determined by any court.

This Court also has stated clearly that even the appearance of bias on the part of a tribunal, *In Re Murchison*, 349 U.S. 133, 139 (1955), or the existence of any factor which might tempt a tribunal to "not hold the balance nice, clear, and true...," *Tumey v. Ohio*, 273 U.S. 510, 513 (1923), denies the defendant due process of law. This constitutional deprivation is only magnified when, as was the case here, the tribunal "become[s] so personally embroiled-...as to make [himself] unfit to sit in judgment...." *Mayberry v. Pennsylvania*, 400 U.S. 455, 464-465 (1971). Yet in this case the merits of Judge Walker's personal involvement and bias have been shielded once again from review or any remedy.

This error is further compounded by the fact that it is accomplished by a refusal by the Texas court of appeals to give proper effect to federal court judgments. Federal judgments have been mischaracterized and misused to insulate once again a deprivation of due process from correction. Petitioners respectfully submit that fact alone should be sufficient to justify the granting of certiorari in this

case and summary reversal of the judgment of the Court of Appeals for the Fifth Supreme Judicial District of Texas.

CONCLUSION

Petitioners Pat S. Holloway and Robbie Holloway therefore urge respectfully that for the foregoing reasons their petition should be granted and the judgment of the Court of Appeals for the Fifth Supreme Judicial District of Texas summarily reversed. Upon summary reversal, Petitioners submit that the Walker judgment should be vacated as to Robbie Holloway on the basis of the egregious violation of her 14th Amendment right to a financially disinterested and impartial trial judge, and the remainder of the cause should be remanded for consideration of Pat S. Holloway's state claims.

Respectfully submitted,

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APPENDIX A

Affirmed and Opinion filed June 30, 1992.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-91-00571-CV

PAT S. HOLLOWAY, ET AL., Appellants

V.

MICHAEL G. STARNES, ET AL., Appellees

On Appeal from the 162nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. 86-07704-I

O P I N I O N

Before Justices Stewart, Baker, and Maloney
Opinion by Justice Stewart

Pat S. Holloway, Robbie Holloway, and Flojo Trading Corporation (collectively appellants) appeal from a summary judgment granted in favor of Michael G. Starnes and the Browning family (collectively appellees) on

appellants' bill of review. Each appellant has filed a separate brief, complaining that the trial court erred in granting appellees' amended motion for summary judgment and in denying their first, third, and sixth motions for partial summary judgment. Additionally, Pat Holloway (Holloway) argues that the trial court erred in denying his request to supplement the summary-judgment record and in permanently enjoining further attack on the judgment in favor of the Brownings. We affirm the trial court's judgment.

FACTUAL BACKGROUND

The litigation between the parties began on September 12, 1979, when the Brownings sued Holloway, Robbie, Humble Exploration Company, and others in Texas state court seeking a constructive trust on Humble's and Holloway's assets, appointment of an interim receiver to manage the disputed assets, and damages (the 1979 case). The 1979 case was filed in the 193rd District Court in Dallas County, Texas. Holloway, Robbie, and Humble filed Chapter 11 voluntary bankruptcy petitions on November 19, 1979 and removed the 1979 case to the United States Bankruptcy Court for the Northern District of Texas (the bankruptcy court). The bankruptcy court remanded the cause to the 193rd District Court and modified the automatic stay to permit trial of the case.

In 1982, a group of investors sued Holloway and the Brownings in the 162nd District Court of Dallas County, Texas, alleging that Humble had wrongfully shut in oil and gas wells jointly owned by Humble and the investors and seeking appointment of a receiver over Humble's assets (the 1982 case).[1] The Brownings cross-claimed against

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1. The Brownings were named as defendants because of their claim in the 1979 case to ownership of the Holloway/Humble assets.

Holloway, alleging the same issues pending in the 1979 case. After a series of orders, the 1979 and 1982 cases were consolidated for trial in the 162nd District Court by Judge Dee Brown Walker, the elected judge of that court. Judge Walker later severed the 1979 and 1982 cases and granted the Brownings an expedited trial of the 1979 case. On October 12, 1982, Holloway converted his Chapter 11 bankruptcy proceeding to a Chapter 7 liquidation proceeding. The bankruptcy court appointed a trustee. On November 11, 1982, the trial court entered an amended judgment for the Brownings imposing a constructive trust on Humble's and Holloway's assets and awarding $72 million in damages (the Walker judgment).[2]

On November 18, 1982, Holloway sued Judge Walker, the Brownings, and the Brownings' attorneys in federal court under title 42, section 1983 of the United States Code (the civil rights suit). Holloway alleged that the Brownings, their attorneys, and Judge Walker had conspired to deny him a fair trial in the state-court trial of the 1979 case. The district court dismissed with prejudice Holloway's section 1983 claim and dismissed without prejudice his pendent state-law claims for negligent and wrongful receivership. The judgment was affirmed on appeal. *Holloway v. Walker*, 784 F.2d 1287 (5th Cir.), *cert. denied*, 479 U.S. 984 (1986).

After filing the civil rights suit, Holloway appealed the Walker judgment to this Court, but posted no supersedeas bond to stay its execution. In March 1983, the Brownings sued in the federal bankruptcy court to enforce the Walker judgment (the enforcement action). The bankruptcy court

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2. The 1982 case remained dormant until 1987, when the Brownings' third-party complaint against Holloway was dismissed with prejudice upon the parties' joint motion.

upheld the bankruptcy's trustee's defense that the trial of the 1979 case violated the bankruptcy court conditional remand order requiring trial before a visiting or retired judge and that, therefore, the Walker judgment was void. *See Browning v. Navarro*, 37 B.R. 201, 210 (N.D. Tex. 1983). Then, on July 11, 1984, this Court granted the Brownings' motion to dismiss Holloway's appeal on the ground that his defense to the enforcement action was a review of the Walker judgment that was inconsistent with his direct appeal and that Holloway was not entitled to two types of review of the Walker judgment. *Humble Explor. Co. v. Browning*, 677 S.W.2d 111, 114-15 (Tex. App.--Dallas 1984), *on mot. to reinstate*, 690 S.W.2d 321 (Tex. App.--Dallas 1985, writ ref'd n.r.e.) (en banc), *cert. denied*, 475 U.S. 1065 (1986). Subsequently, the Fifth Circuit reversed the district court's decision in the enforcement action that the judgment was void and held that the 162nd District Court had jurisdiction to enter the Walker judgment. *Browning v. Navarro*, 743 F.2d 1069 (5th Cir. 1984) (Browning I). Thereafter, this Court vacated its prior order of dismissal; however, we later reinstated the order of dismissal. *Humble Explor. Co. v. Browning*, 690 S.W.2d 321 (Tex. App.--Dallas 1985, writ ref'd n.r.e.)(en banc), *cert. denied*, 475 U.S. 1065 (1986). On remand of the enforcement action, the bankruptcy court denied Holloway's motion for summary judgment based on alleged fraud in the state-court proceedings. Holloway appealed, and the Fifth Circuit narrowed the issues in the case as follows: (1) Holloway could argue that the Walker judgment was void because it was obtained by fraud; and (2) the Brownings could argue that res judicata barred Holloway from raising the issue of fraud. *Browning v. Navarro*, 826 F.2d 335, 346 (5th Cir. 1987) (Browning II). On remand, the bankruptcy court denied the Brownings' motion for summary judgment and held that res judicata did not bar Holloway's attack on the Walker judgment. This issue was certified for interlocutory appeal. On appeal, the Fifth

Circuit reversed and held that res judicata precluded Holloway's claims that the Walker judgment was procured by fraud. *Browning v. Navarro*, 887 F.2d 553, 559-60 (5th Cir. 1989) (Browning III).

On June 16, 1986, appellants filed this combined collateral attack and bill of review in the 162nd District Court attacking the Walker judgment. The bill of review alleged that appellants had meritorious defenses to all of the claims asserted by the Brownings in the trial of the 1979 case. They further alleged that, through no fault, negligence, or lack of diligence on their part, they were prevented from fully presenting their defenses because of (1) Judge Walker's bias, fraud, and conspiracy with the Brownings, their attorneys, and others and (2) Judge Walker's various unconstitutional and illegal rulings. Holloway also asserted that he had no control over and no way to prevent Judge Walker's bias and fraudulent conspiracy with the Brownings and their attorneys. Appellees subsequently moved for summary judgment. Appellants filed several motions for partial summary judgment. The trial court granted appellees' amended motion for summary judgment and enjoined Holloway and Robbie from further state-court litigation seeking to overturn the Walker judgment. Appellants then perfected this appeal.

APPELLEES' MOTION FOR SUMMARY JUDGMENT

Appellees' amended motion for summary judgment alleged, *inter alia*, that: (1) appellants' collateral attack and bill of review were barred by res judicata and collateral estoppel; (2) the collateral attack was without merit because the Walker judgment contains a jurisdictional recital that imports absolute verity and is conclusive; (3) Flojo is prohibited by section 171.252 of the Texas Tax Code from either suing or defending a suit in the Texas courts; and (4)

this Court dismissed appellants' appeal because they elected their remedy by claiming in defense to the enforcement action that the Walker judgment was void.

A bill of review, when properly brought, is a direct attack on a judgment. *Fender v. Moss*, 696 S.W.2d 410, 412 (Tex. App.--Dallas 1985, writ ref'd n.r.e.). It is proper method to attack a judgment when the trial court had jurisdiction to render judgment on the merits. *Gonzalez v. Mann*, 584 S.W.2d 928, 930 (Tex. Civ. App.--Houston [14th Dist.] 1979, writ ref'd n.r.e.). The purpose of a direct attack is to change the former judgment and to secure the entry of a correct judgment. *Austin Indep. School Dist. v. Sierra Club*, 495 S.W.2d 878, 881 (Tex. 1973). This relief may be obtained on the basis of any error that probably caused the rendition of an improper judgment. *Id.* In a direct attack, such as a bill of review, no presumptions are indulged in support of the judgment's validity. *Fender*, 696 S.W.2d at 412.

A collateral attack is proper only if the judgment if "void in law." *Gonzalez*, 584 S.W.2d at 930. The judgment of a court of general jurisdiction is not subject to collateral attack except on the ground that it had no jurisdiction of the person of a party or his property, no jurisdiction of the subject matter, no jurisdiction to enter the particular judgment, or no capacity to act as a court. *Cook v. Cameron*, 733 S.W.2d 137, 140 (Tex. 1987) (citing *Browning v. Placke*, 698 S.W.2d 362, 363 (Tex. 1985)); *Austin Indep. School Dist.*, 495 S.W.2d at 881. Errors other than lack of jurisdiction render the judgment merely voidable. *Cook*, 733 S.W.2d at 140. In a collateral attack, extrinsic evidence may not be used to establish a lack of jurisdiction. *Huffstutlar v. Koons*, 789 S.W.2d 707, 710 (Tex. App.--Dallas 1990, orig. proceeding) (en banc). Jurisdictional recitals in the judgment control the rest of the

record so that, even though other parts of the record show a lack of jurisdiction, if the judgement recites the contrary, the collateral attack fails. *Id.*

A. Holloway's Arguments

In his first point of error, Holloway complains that the trial court erred in granting appellees' amended motion for summary judgment. Holloway's arguments under his first point of error concern only the granting of summary judgment on the bill of review. He raises no argument concerning the trial court's granting of summary judgment on his collateral attack. Holloway states that the granting of appellees' summary-judgment motion presents this Court with two issues of first impression in this state: (1) whether the prior dismissal of an appeal that does not involve a determination on the merits of the issues presented precludes a subsequent petition for bill of review either by application of res judicata or by concluding that the petitioner had failed to pursue available appellate remedies; and (2) whether related litigation in the federal court system that has not resulted in a determination of the merits of the issues presented by the bill of review will preclude the bill of review by application of res judicata or collateral estoppel. Accordingly, our discussion of Holloway's first point of error concerns only the bill of review.

In reviewing a summary-judgment record, this Court applies the following standards:

> 1. The movant for summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.

> 2. In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true.
>
> 3. Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in his favor.

Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 548-49 (Tex. 1985). When the trial court's judgment does not state the grounds upon which it granted the motion for summary judgment, the appellant must show that each of the independent arguments alleged in the motion is insufficient to support summary judgment. *McCrea v. Cubilla Condominium Corp.*, 685 S.W.2d 755, 757 (Tex. App.--Houston [1st Dist.] 1985, writ ref'd n.r.e.). Thus, if we determine that one of the grounds alleged supports the summary judgment, we affirm.

Appellees alleged in their amended summary-judgment motion that res judicata bars the claims raised in the bill of review. Res judicata applies to bill-of-review proceedings. *Rizk v. Mayad*, 603 S.W.2d 773, 779 (Tex. 1980); *see Browning v. Navarro*, 923 F.2d 377 (5th Cir. 1991) (per curiam) (Browning IV). The res judicata effect of federal litigation on subsequent state-court litigation is governed by the federal law of res judicata. *Jeanes v. Henderson*, 688 S.W.2d 100, 103 (Tex. 1985). For a prior judgment to bar an action on the basis of res judicata, the parties must be identical in both suits, the prior judgment must have been rendered by a court of competent jurisdiction, there must have been a final judgment on the merits, and both cases must involve the same cause of action.

Browning III, 887 F.2d at 558 (citing *Nilsen v. City of Moss Point*, 701 F.2d 556, 559 (5th Cir. 1983)). Res judicata bars all claims that were or could have been advanced in support of the cause of action on the occasion of its former adjudication. *Nilsen*, 701 F.2d at 560 (citing *Allen v. McCurry*, 449 U.S. 90,94 (1980)). It does not apply merely to those causes of action that were adjudicated. *Nilsen*, 701 F.2d at 560. A claim is not barred by res judicata if it could not have been brought. *Browning III*, 887 F.2d at 558.

Holloway acknowledges that "there is no question that the claims for relief presented by [him] in this bill of review arise out of the same common nucleus of operative fact as the claims and defenses asserted in the related federal litigation, such that in Restatement terms this case and the federal litigation involve the same transaction or cause of action." *See* RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982). He asserts, however, that the federal-court judgments cannot bar this bill of review because the federal courts had no jurisdiction to hear this claim for equitable relief. *See Placke*, 698 S.w.2d at 363 (bill of review can be brought only in court that rendered the judgment sought to be vacated. He contends that the prior federal-court litigation is of no consequence to this bill-of-review proceeding. We disagree.

Holloway's analysis focuses on the nature of the proceeding itself. Res judicata, however, focuses on whether *claims* were or could have been brought in a prior action. The fact that the federal courts had no jurisdiction to hear Holloway's bill-or-review *proceeding* is irrelevant in determining whether his present *claims* were or could have been brought in a prior federal-court proceeding. If Holloway's present claims either were or could have been asserted in a prior proceeding, res judicata bars this bill of review. Accordingly, to determine the preclusive effect, if

any, of the prior litigation between the parties, we first must pinpoint the nature of the claims asserted by Holloway then and now. If his claims are the same, we then must determine whether the claims either were or could have been brought in the prior federal litigation.

Appellees urge that all of Holloway's present claims either were or could have been presented in either the enforcement action or in the civil rights suit. In both cases, Holloway sought to avoid enforcement of the Walker judgment. In the civil rights suit, Holloway brought a section 1983 action against Judge Walker, the Brownings, legal counsel for the Brownings, and others, alleging that they had conspired to violate his civil rights in the 1979 case. Holloway asserted that the Walker judgment was void because the defendants had conspired to seize control of Humble through the abuse of Judge Walker's judicial office. *Holloway v. Walker*, 784 F.2d at 1289. Specifically, Holloway alleged that: (1) Judge Walker, the Brownings, the Brownings' attorneys, and the other defendants had arranged to have the 1982 case brought before Judge Walker's court contrary to the usual procedure for assigning cases; and (2) Judge Walker arranged to have the 1979 and 1982 cases consolidated in his court, imposed receiverships on Humble's and Holloway's assets, defied a mandamus order of this Court to refrain from interfering in Humble's business, appointed an incompetent receiver for Humble, dismissed many Humble personnel, posted guards at Humble's headquarters to seize the building, prohibited release of corporate and legal files during the trial, and conducted ex parte meetings at a hotel near the courthouse regarding Humble's business. *Browning II*, 826 F.2d at 338. The district court granted summary judgment to all defendants, holding that the alleged acts of judicial conspiracy and lack of postdeprivation remedy did not amount to a violation of

substantive due process cognizable under section 1983.[3] *Holloway*, 784 F.2d at 1290. The Fifth Circuit affirmed the summary judgment. *Id.*

In the enforcement action, Holloway urged that the Walker judgment was void because (1) it violated the automatic stay since it was not tried before a visiting or retired judge, and (2) Judge Walker and the Brownings' attorneys colluded to deprive him of a fair and complete trial by corruptly abusing the judicial process. After the district court's summary judgment for Holloway on the first ground above was reversed on appeal, *Browning I*, 743 F.2d at 1076-86, Holloway moved for summary judgment on the ground that Judge Walker and the Brownings' attorneys had colluded to corruptly abuse the judicial process. Specifically, Holloway asserted that the Brownings' attorneys clandestinely acted to have the 1979 case consolidated with the 1982 case and, behind Holloway's back, arranged to have the case set before Judge Walker, that Judge Walker was known to be under the control of the Brownings' attorneys, who often bragged about this fact, that the Brownings' attorneys bragged about their plans to "gut" Holloway in Judge Walker's court; that Judge Walker engaged in numerous private conferences with the Brownings' attorneys regarding the Brownings' attempts to take control of Humble's and Holloway's assets; that the Brownings' attorneys and Judge Walker engaged in private conferences during trial and colluded to give the jury instructions favorable to the Brownings; that Holloway was not given proper notice of meetings relating to the trial; that Holloway

---

3. The court noted that Texas courts in fact provided an adequate postdeprivation remedy through the right of appeal, which had been lost through a unique, complex mix of events "which Holloway played a major part in creating."

was denied access to documents and files necessary to his defense because the receiver removed the documents and files from Humble's offices; that Judge Walker's mid-trial order discharging Holloway's and Humble's attorneys denied Holloway the right to effective counsel; that one of the Brownings' attorneys acted as bailiff for the jury during the course of the trial; and that, during the course of trial, the Brownings' attorneys were actively representing Judge Walker in other matters. *Browning II*, 826 F.2d at 345-46. The district court denied Holloway's summary-judgment motion.

The Fifth Circuit again reversed and held that the only defense remaining available to Holloway was that the Walker judgment was procured by fraud, although res judicata might bar consideration of the issue. *Id.* at 346. It stated that, to satisfy his burden to demonstrate that the Walker judgment was procured by fraud, Holloway had to demonstrate that the judgment was obtained as a result of a scheme or collusion that (1) was designed to corruptly influence the proceedings or to inhibit the ability of an adverse party to fully present his case or defense and (2) had the effect of foreclosing to him the opportunity to have a fair and complete trial. *Id.* at 345. To set aside the judgment, the court had to be convinced that the trial was rendered so fundamentally unfair by the scheme or collusion that the court lacked confidence that the judgment was soundly based on law and fact. *Id.* The Fifth Circuit stated that Holloway's pleadings, affidavits, and briefs alleged facts that, if proved, might meet this test. *Id.* If Holloway could satisfy his burden to show that the judgment was procured by fraud *and if res judicata did not bar consideration of that issue*, the bankruptcy court would determine the extent to which the Walker judgment would be enforced. *Id.* at 346. The court remanded the cause with instructions to allow the

Brownings to amend their summary-judgment motion to allege res judicata. On remand, the motion was so amended. The district court denied the Brownings' motion.

On interlocutory appeal from this judgment, the Fifth Circuit reversed and held that Holloway's claim was precluded by res judicata. The court noted that, in the enforcement action and in the civil rights case, the gravamen of Holloway's complaints was that the Walker judgment was fraudulently obtained. *Browning III*, 887 F.2d at 558. The court stated that the first three requirements of res judicata were satisfied because both claims involved one cause of action, the parties to the second actions were the same, and the civil rights judgment was final and on the merits. *Id.* The fourth prerequisite for application of res judicata was satisfied because the fraud claim could have been brought in prior suits between the parties. First, the bankruptcy court was authorized to entertain a motion to vacate the allegedly fraudulent state-court judgment. *Id.* at 559 (citing 11 U.S.C. § 105). Second, Holloway could have raised his fraud claim by invoking the bankruptcy jurisdiction of the district court that heard the civil rights case under the Emergency Rule.[4] *Browning III*, 887 F.2d at 560. Holloway's bankruptcy was still in progress when he brought the civil rights case, and he would have initiated an adversary proceeding had he sought to enjoin the Walker judgment. Under the Emergency Rule, a proceeding to enjoin a court had to be heard by the district court. Through this process, the district court hearing the civil rights case could have heard Holloway's fraud claims.

---

4. After the United States Supreme Court declared unconstitutional the grant of jurisdiction to bankruptcy courts under the Bankruptcy Reform Act of 1978, an "Emergency Rule" was adopted and governed bankruptcy proceedings until the Bankruptcy Amendments and Federal Judgeship Act of 1984 was enacted. *Browning III*, 887 F.2d at 560.

Id. at 560 & nn.11-13. Because all requirement of res judicata had been met, the Fifth Circuit concluded that Holloway's fraud claims were barred.

The Fifth Circuit recently pointed out that, although nothing in the district court judgment or in any federal opinion prejudiced Holloway's right to seek an equitable bill of review, the principles of res judicata or collateral estoppel may bar particular claims or issues sought to be raised by such a bill. *Browning IV*, 923 F.2d at 377.

Holloway's bill of review at issue in this appeal alleges that he was prevented from fully presenting his meritorious defenses at the trial of the 1979 case because of (1) Judge Walker's bias, fraud, and conspiracy with the Brownings, their attorneys, and others and (2) Judge Walker's various unconstitutional and illegal rulings. Holloway's pleading asserts that Judge Walker: (1) "acted as counsel" in the 1979 case; (2) was "interested" in the case; (3) was biased; and (4) conspired with the Brownings to decide the 1979 case against appellants. Holloway relies on most of the factual allegations relied on in the civil rights case and in the enforcement action to support his conspiracy and corruption theories. Holloway did not assert in those previous cases that Judge Walker was interested because he allegedly hired a former Dallas County judge to represent him in the case and paid him out of Humble's assets. However, this factual allegation could have been made in either of the prior suits in support of Holloway's fraud claim. The rest of Holloway's factual allegations have been asserted in previous actions and in this action for one purpose--to have the Walker judgment set aside as void or voidable. Holloway's present claims arise out of the same facts and involve the same parties as the civil rights case and the enforcement action. The judgments in both prior cases are final and on the merits. Holloway either made or could have

made all of the claims that he now asserts in either the civil rights case or in the enforcement action. Further, the Fifth Circuit in the enforcement case determined that Holloway's attempt to set aside the Walker judgment based on these same factual allegations was barred by res judicata. *Browning III*, 887 F.2d at 558-69. We conclude that Holloway's bill-of-review claims are barred by res judicata and, thus, cannot be asserted in an equitable bill of review. Accordingly, the trial court did not err in granting summary judgment against Holloway. We overrule Holloway's first point of error.

B. Robbie's Arguments

In her first point of error, Robbie contends that the trial court erred in granting summary judgment against her. Robbie argues that the claims and issues asserted here were not and could not have been litigated in either of the cases to which she was a party, *i.e.*, the direct appeal of the Walker judgment to this Court and *Browning I*. Robbie concedes that she is barred from litigating whether the 162nd District Court had jurisdiction to enter the Walker judgment because the issue was decided in *Browning I*. She asserts that she is not barred by the subsequent proceedings in *Browning II, III,* or *IV* because she did not participate in those appeals or by the civil rights suit because she was not a party. Robbie further contends that her bill-of-review claims that the Walker judgment was the product of extrinsic fraud, conspiracy, and collusion between Judge Walker and the Brownings did not arise until Judge Walker entered the Walker judgment and could not have been presented to this Court on the record of the appeal of the Walker judgment. She concludes that neither this Court's dismissal of the appeal of the Walker judgment, nor the appeals in the enforcement action (beyond *Browning I*), nor the civil rights suit bars her bill of review or collateral attack.

As previously stated, res judicata focuses on claims that were or could have been raised in prior litigation between the parties, not on whether particular issues actually were decided. Robbie was a party to the enforcement action when it was filed, and, as previously stated, the claims asserted here could have been raised in the enforcement action. *See id.* at 559. It is of no consequence that Robbie was not a party to the appeals when the claims or issues actually were decided. For res judicata purposes, it does not matter whether a claim actually was litigated, only whether the claim could have been brought. *Nilsen*, 701 F.2d at 560. Robbie cannot avoid the effects of res Judicata on the ground that she did not participate in the cases on appeal. Because Robbie could have brought her claims in the enforcement action, we need not determine whether they could have been brought in the direct appeal to this Court. We conclude that res judicata bars Robbie from bringing the present claims in an equitable bill or review or a collateral attack.

Further, Robbie may not collaterally attack the Walker judgment on the ground that Flojo was not served and did not appear. If a court having potential jurisdiction renders a judgment when the potential jurisdiction has not been activated and the defect is apparent *from the fact of the judgment*, then the judgment is void and subject to either direct or collateral attack. *Waldron v. Waldron*, 614 S.W.2d 648, 650 (Tex. Civ. App.--Amarillo 1981, no writ). If, however, a court having potential jurisdiction renders a judgment regular on its face that contains recitations stating that its potential jurisdiction has been activated, the judgment is voidable, not void, and may be set aside only by direct attack. *Id.* Thus, the claims made by Robbie are not the type available to her in a collateral attack on the Walker judgment. We overrule Robbie's first point of error.

C. Flojo's Arguments

In its first point of error, Flojo alleges that the trial court erred in granting appellees' motion for summary judgment based on res judicata because it was not a party either to the original Walker judgment sought to be vacated or to any subsequent case which could bar this bill of review. Flojo contends that it never was named, never was served, and never appeared in the trial of the 1979 case and that, therefore, it need not meet the requirements for a bill of review because the Walker judgment is void. *See Peralta v. Heights Med. Center*, 485 U.S. 80 (1988). It argues that it is not barred by res judicata or collateral estoppel because it was not a party to the prior federal litigation. Flojo concludes that there is no legal justification for any claim that its constitutional and equitable right to set aside the Walker judgment is barred by res judicata.

In addition to res judicata, appellees' summary-judgment motion asserted that Flojo could neither sue nor defend a suit in Texas courts because it had forfeited its corporate charter. *See* Tex. Tax Code Ann. § 171.252 (Vernon 1982). Appellees filed a certified copy of the document from the Texas Secretary of State that ordered the forfeiture of Flojo's certificate of authority on February 20, 1984. Flojo filed no response to appellees' motion. Nothing in the summary-judgment record suggests that Flojo regained its corporate privileges. We note that Flojo has attached to its brief as Exhibit B a copy of a document from the Texas Comptroller of Public Accounts stating that Flojo, as of March 4, 1991, is "in good standing" with that office. This document, however, is not part of our record on appeal and was not before the trial court when it granted appellees' amended motion for summary judgment. Thus, we cannot

consider it in this appeal. *Perry v. Kroger Stores Store No. 119*, 741 S.W.2d 533, 534 (Tex. App.--Dallas 1987, writ denied).

Flojo does not assert a general point of error that the trial court erred in granting summary judgment against it. *See Malooly Bros., Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970). Instead, on appeal, it specifically contends that res judicata does not apply to it. Flojo fails to argue on appeal that the trial court erred in granting summary judgment on the ground that forfeiture of its corporate charter barred this attack on the Walker judgment. Because summary judgment may have been granted, properly or improperly, on a ground not challenged by Flojo in a point of error on appeal, we affirm the summary judgment as to Flojo. *Id.; King v. Texas Employers' Ins. Ass'n*, 716 S.W.2d 181, 182-83 (Tex. App.--Fort Worth 1986, no writ). We overrule Flojo's first point of error.

APPELLANTS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT

A. First and Sixth Motions

In their respective third and fourth points, appellants urge that the trial court erred in denying their first and sixth motions for partial summary judgment. Those motions urged that Judge Walker was disqualified to preside over the 1979 case due to his pecuniary and personal interest, his acts as "counsel" in the 1979 case, and his bias in the case. For these reasons, appellants contended that the Walker judgment was void. The disqualification claims are based on the same facts that appellants have relied on for their fraud, collusion, and conspiracy claims. Because we hold that the trial court properly granted summary judgment on these claims, we also hold that the trial court did not err in denying appellants'

first and sixth motions for partial summary judgment. We overrule appellants' respective third and fourth points of error.

B. Third Motion

In their respective second points of error, appellants argue that the trial court erred in denying the third motion for partial summary judgment asserting that the Walker judgment is void because it imposed joint and several liability on Holloway, Robbie, and Flojo although Flojo never was named as a defendant, never was served with process, and never appeared in the 1979 case. Robbie, but not Flojo, adopted Holloway's amended third motion for partial summary judgment. Holloway attached to this motion the affidavit of Joe Holt, who stated that Flojo was owned and operated by individuals other than Holloway and that Flojo never was named as a party, never was served with process, and never appeared in the case. At the trial of the 1979 case, the jury found that Flojo was Holloway's alter ego; the trial court so found in the Walker judgment.

Our determination that res judicata applies to appellants' claims dealing with the facts set forth above does not dispose of appellants' respective second points of error. A finding that res judicata bars appellants' bill of review does not dispose of the issue of whether the judgment is void because of lack of service.

Holloway argues that a judgment against a "party" who never was named, never was served with process, and never appeared is absolutely void and of no effect and that federal due process requires that such a judgment be set aside in a bill-of-review proceeding without regard to satisfaction of the other requirements of a bill. He contends that the 162nd District Court had no jurisdiction to enter a judgment

imposing liability against Flojo. Thus, he asserts that the joint judgment is indivisible in nature and is void as to all defendants named in it if it is void as to one of them. *See Reed v. Gum Keepsake Diamond Center*, 657 S.W.2d 524 (Tex. App.--Corpus Christi 1983, no writ).

Reed is distinguishable from this case. There, the trial court never obtained personal jurisdiction for lack of service over a named defendant. *Id.* at 525. Because the trial court had neither severed nor dismissed the claims against the parties over whom jurisdiction had not been obtained, the judgment against the defendants over whom jurisdiction had been obtained was interlocutory. *Id.* Because the judgment was not final, the cause was remanded to the trial court for further proceedings. Here, Flojo was not a named defendant in the 1979 case. Even is the 162nd District Court lacked jurisdiction over Flojo despite its alter ego status, its judgment resolved all issues involving all parties named in the suit. Thus, the Walker judgment was a final judgment against the named parties, including Holloway and Robbie.

Maury v. Turner also is inapplicable to this case because there the plaintiff sued "the unknown owner" of certain real property. *Maury v. Turner*, 244 S.W. 809, 812 (Tex. Comm'n App. 1922, judgm't adopted). The plaintiff's suit was not the type authorized by statute to be maintained against unknown persons. *Id.* Absent statutory authority for the plaintiff's suit, the trial court lacked jurisdiction over the case, and the judgment was void. *Id.* The case of *Commonwealth Bank & Trust Co. v. Heid Bros.*, 52 S.W.2d 74 (Tex. Comm'n App. 1932, judgm't adopted), dealt with a certified question from the El Paso Court of Appeals concerning whether the plaintiff's lawsuit could be maintained in Bexar County against Heid Brothers, a corporation domiciled in El Paso County, by virtue of the

exceptions to statutory provisions concerning exclusive venue. The court ruled that Heid Brothers and the other defendant were jointly and severally liable to the plaintiff bank, making Heid Brothers a proper and necessary party to the bank's lawsuit. *Id.* at 75. The court then concluded that the district court of Bexar County had jurisdiction over Heid Brothers. *Id.* at 76.

Even if the trial court erroneously included Flojo in the Walker judgment, such would not require reversal of the judgment as to Holloway or Robbie. Where the error affects only a part of the matter in controversy and that part is clearly separable without unfairness to the parties, the judgment shall be reversed and a new trial ordered *only* as to that part affected by such error. Tex. R. App. P. 81(b)(1). Here, the liability of Flojo, as Holloway's alter ego, was strictly derivative. Although a reversal as to Holloway would require a reversal as to Flojo, the reverse is not true. Were we to reverse only as to Flojo, Holloway's liability would be unaffected. Likewise, Robbie's liability in the 1979 case is not dependent on Flojo's liability. Reversal of that part of the judgment concerning Flojo clearly would be separable without unfairness to the parties. We overrule Holloway's and Robbie's second points of error.

Because Flojo did not adopt the amended third motion for partial summary judgment, we hold that it cannot rely on that motion for reversal on appeal. *See Teer v. Duddleston*, 664 S.W.2d 702,703 (Tex. 1984) (trial court cannot grant summary judgment for party who has not properly moved for summary judgment). Further, as previously stated, Flojo submitted no evidence to the trial court that it regained its corporate privileges and that it is, thus, entitled to challenge the Walker judgment in a Texas court. Finally, to the extent that Flojo attempted to collaterally attack the judgment, a defendant who is not served and does not appear may not

attack the verity of a judgment in a collateral proceeding; the jurisdictional recitals import absolute verity. *See Akers v. Simpson*, 445 S.W.2d 957, 959 (Tex 1969). As previously stated, the Walker judgment states that the court had jurisdiction over the parties. We hold that the recitals rendering judgment against Flojo conclusively demonstrate that it was a party to the suit. We overrule Flojo's second point.

BANKRUPTCY COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

In the fifth point, Holloway contends that the trial court erred in denying his motion to supplement the summary-judgment record with the bankruptcy court's findings of fact and conclusions of law in the bankruptcy case. Holloway argues on appeal that the findings and conclusions were necessary summary-judgment evidence to determine which issues decided by the bankruptcy court are binding for purposes of collateral estoppel.

Although appellees asserted collateral estoppel as a ground for summary judgment, we have held that summary judgment was proper on the ground of claim preclusion, *i.e.*, res judicata. Thus, the trial court's denial of Holloway's request did not adversely affect his position because the bankruptcy court's findings and conclusions were irrelevant to a determination of the applicability of res judicata to Holloway's bill of review. We overrule Holloway's fifth point.

PERMANENT INJUNCTION

In the sixth point, Holloway argues that the trial court erred in permanently enjoining him from further challenging the validity of the Walker judgment. Holloway's point of error assumes that this Court will reverse the trial court's granting of appellees' amended summary-judgment motion. Holloway states in his brief that "[i]t would be inconsistent and conflicting to reverse this cause to permit trial of the bill of review and at the same time leave in place the permanent injunction prohibiting [Holloway] from proceeding in that cause." Overruling the first point of error disposes of this point. The injunction does not prohibit Holloway from appealing this case. Holloway gives no reason why he should be permitted to initiate or to continue other attacks on the Walker judgment in other proceedings, which is what the injunction prohibits. We overrule Holloway's sixth point of error.

We affirm the trial court's judgment.

/s/ Annette Stewart
ANNETTE STEWART
JUSTICE

Publish
Tex. R.App. P. 90
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APPENDIX B

Order issued August 27, 1992

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-91-00571-CV

PAT S. HOLLOWAY, ET AL., Appellants

V.

MICHAEL G. STARNES, ET AL., Appellees

ORDER

Before Justices Stewart, Baker, and Maloney

It is **ORDERED** that the motions for rehearing filed by appellants Pat S. Holloway, Robbie Holloway, and Flojo Trading Corporation are **DENIED**.

/s/ Annette Stewart
ANNETTE STEWART
JUSTICE

APPENDIX C

RECEIVED
FEB 11 1993

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

February, 10, 1993

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D-2954 pg 1 of 2

THE SUPREME COURT OF TEXAS
P.O BOX 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

RE: Case No. D-2954

Style: PAT S. HOLLOWAY ET AL.
v. MICHAEL G. STARNES ET AL.

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced applications (3) for writ of error with the notation, "Writ Denied". Justice Enoch not sitting. Respondent's motion to extend length of brief is overruled.

Respectfully yours,

JOHN T. ADAMS, CLERK

BY: /s/ Michael C. Murphey
Michael C. Murphey, Deputy Clerk

APPENDIX D

RECEIVED
MAR 25 1993

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

March 24, 1993

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RE: Case No. D-2954

Style: PAT S. HOLLOWAY ET AL.
v. MICHAEL G. STARNES ET AL.

THE SUPREME COURT OF TEXAS

P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

Dear Counsel:

Today, the Supreme Court of Texas overruled all the motions for rehearing in the above referenced application/s for writ of error. (Justice Enoch not sitting.)

Sincerely,

John T. Adams, Clerk

by /s/ Blanca Morin
Blanca Morin, Deputy

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

PAT S. HOLLOWAY, Individually,	§	
and wife BRENDA HOLLOWAY,	§	
Individually,	§	
HUMBLE EXPLORATION COMPANY	§	
INC., AND STERLING PIPELINE	§	
COMPANY, and DON NAVARRO,	§	
Trustee of the Estates of	§	
HUMBLE EXPLORATION COMPANY,	§	
INC., and PAT S. HOLLOWAY	§	
	§	
Plaintiffs,	§	
VS.	§	
	§	
JUDGE DEE BROWN WALKER,	§	
JUDGE OF THE 162ND JUDICIAL	§	
DISTRICT COURT OF DALLAS	§	
COUNTY TEXAS	§	
G. H. KELSOE, JR., R. JACK	§	
AYRES, JR., Individually, and	§	
as a Professional Corporation,	§	
JOHN WRIGHT	§	
WHITLEY R. SESSIONS, J. R.	§	
HURT, JANE H. BROWNING,	§	
Individually as Co-Independent	§	NO. CA-3-
Executrix & as Co-Trustee,	§	82-1846-H
of the ESTATE OF	§	
WILLIAM W. BROWNING JR.,	§	
Deceased, MICHAEL G. STARNES,	§	
Individually as Co-Independent	§	
Executor of the ESTATE OF	§	

WILLIAM W. BROWNING, JR.,	§
Deceased, and as Trustee for	§
Kathryn Louise Browning Cook,	§
Averille Adams Browning	§
William Webb Browning III	§
Winifred Fallon Browning	§
and Robert Holland Browning;	§
CATHERINE AGNES LAND STARNES	§
Individually; KATHRYN LOUISE	§
BROWNING COOK, Individually,	§
AVERILLE ADAMS BROWNING,	§
Individually, WILLIAM WEBB	§
BROWNING III, ROBERT HOLLAND	§
BROWNING, Individually, and	§
WINIFRED FALON BROWNING,	§
Individually, and FAIRWAY LAND	§
COMPANY, FAYETTE OIL	§
COMPANY, AMCAP PETROLEUM	§
ASSOCIATES-1977, AMCAP	§
PETROLEUM ASSOCIATES-1979B,	§
AMERICAN HAWK OIL COMPANY,	§
AMERICAN FALCON OIL COMPANY,	§
AMERICAN EAGLE OIL COMPANY,	§
AMERICAN HERON OIL COMPANY,	§
AMERICAN WREN OIL COMPANY,	§
AMERICAN RAVEN OIL COMPANY,	§
HARPER OIL COMPANY and	§
JEFFREY WEISS and DONALD	§
GINSBERG, Individually, and as General	§
Partners of AMERICAN PETROLEUM	§
PARTNERS	§
	§
Defendants.	§

PLAINTIFFS' SECOND AMENDED COMPLAINT AND APPLICATION FOR DECLARATORY AND INJUNCTIVE RELIEF

PAT S. HOLLOWAY, Individually, and wife BRENDA HOLLOWAY, Individually ("HOLLOWAY"), HUMBLE EXPLORATION COMPANY, INC. ("HUMBLE"), STERLING PIPELINE COMPANY ("STERLING"), AND DON NAVARRO ("NAVARRO"), Trustee of the Estates of Humble Exploration Company, Inc., and PAT HOLLOWAY, Plaintiffs herein, file this their Second Amended Complaint and Application for Injunctive and Declaratory Relief, complaining of JUDGE DEE BROWN WALKER, individually and in his official capacity as JUDGE OF THE 162nd JUDICIAL DISTRICT COURT OF DALLAS COUNTY, TEXAS, G. H. KELSOE, JR., R. JACK AYRES, JR., Individually, and as a professional corporation, JOHN WRIGHT, WHITLEY R. SESSIONS, J. R. HURT, JANE H. BROWNING, Individually and as Co-Independent Executrix and as Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased, MICHAEL G. STARNES, Individually and as Co-Independent Executor of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased, and as Trustee for Kathryn Louise Browning Cook, Averille Adams Browning, William Webb Browning III, Winifred Fallon Browning, and Robert Holland Browning; CATHERINE AGNES LAND STARNES, Individually; KATHRYN LOUISE BROWNING COOK, Individually, AVERILLE ADAMS BROWNING, Individually, WILLIAM WEBB BROWNING III, Individually, and ROBERT HOLLAND BROWNING, Individually, ("THE BROWNINGS"); FAIRWAY LAND COMPANY, FAYETTE OIL COMPANY, AMCAP PETROLEUM ASSOCIATES-1977, AMCAP PETROLEUM ASSOCIATES-1979B, AMERICAN HAWK OIL

COMPANY, AMERICAN FALCON OIL COMPANY, AMERICAN EAGLE OIL COMPANY, AMERICAN HERON OIL COMPANY, AMERICAN WREN OIL COMPANY, AMERICAN RAVEN OIL COMPANY, HARPER OIL COMPANY, and JEFFREY WEISS and DONALD GINSBERG, Individually and as General Partners of AMERICAN PETROLEUM PARTNERS, (hereinafter the "APP ENTITIES"), Defendants herein, and for their complaint would show the Court:

PARTIES

1. Plaintiffs Pat S. Holloway and Brenda Holloway are residents of and domiciled in Lee County, Texas. Plaintiffs Humble Exploration Company, Inc., and Sterling Pipeline Company are Texas corporations with their corporate offices in Dallas, Dallas County, Texas.

2. Don Navarro, Trustee of the Estates of Humble Exploration Company, Inc. and Pat S. Holloway, was appointed as Trustee by the United States Bankruptcy court, with his office in Dallas, Dallas County, Texas.

JURISDICTION AND VENUE

4. The jurisdiction of this Court is invoked pursuant to provisions of 28 U.S.C. §§ 1331, 1343(3), and 2201. This complaint is based upon 42 U.S.C. § 1983 *et seq.*, this being a suit in equity and at law which is authorized by law to be brought to redress the deprivation under color of state law, statute, ordinance, regulation, custom or usage of rights, privileges, and immunities secured by the Constitution and the laws of the United States or by any act of Congress providing for equal rights of citizens. The rights here sought to be redressed are rights guaranteed by the due process clause of the Fourteenth Amendment to the Constitution of the United States.

5. Plaintiffs further invoke the pendent jurisdiction of this Court to consider their state law causes of action which arise out of the same common nucleus of operative facts that have given rise to Plaintiffs' claims under 42 U.S.C. § 1983, the Fourteenth Amendment to the United States Constitution.

6. Venue is proper in the Northern District of Texas pursuant to 28 U.S.C. § 1965(a).

FACTUAL ALLEGATIONS

7. The Defendants hereinabove named, entered into a conspiracy, the full extent of which is unknown, both individually and jointly between themselves and with other persons.

190. Plaintiffs further seek a judgment and an award Defendants for reasonable attorney's fees and court costs pursuant to 42 U.S.C. § 1988, and for attorney's fees and court costs that have been incurred to date in securing the removal of the wrongful receiver.

COUNT SEVEN: DECLARATORY JUDGMENT

191. Plaintiffs hereby adopt and reallege all of the allegations of paragraph 1-190.

192. Plaintiffs, in the alternative, and in addition to the foregoing, and without waiving any of the foregoing, seek a declaratory judgment pursuant to 28 U.S.C. § 2201, for the purpose of determining a question of actual controversy between the parties, as hereinafter more fully appears.

193. On January 17, 1980, Plaintiffs and Defendants entered into the Stipulation and Agreement which became part of the Order of the Bankruptcy Court in order to remand the cause of action between the parties to the state trial level.

194. On June 8, 1982, Defendants Browning, Kelsoe and Ayres with full knowledge of their Stipulation and Agreement and the subsequent order of the Bankruptcy Court, sought action in violation thereof from the state district court, Defendant Judge Walker presiding.

195. The acts of Defendants Browning, Kelsoe, and Ayres and the subsequent actions of Defendant Judge Walker, interfered with the exercise of Plaintiffs' rights, to Plaintiffs' detriment, in both the Stipulation and Agreement and subsequent court order and thus denied Plaintiffs the benefit of said Stipulation and Agreement.

196. Plaintiffs are entitled to a judgment declaring the effect of the Bankruptcy Court's orders which incorporated the Stipulation and Agreement to be a complete and conclusive bar against any acts by Defendants contrary to the terms of said order.

197. The acts of the named Defendants have individually and jointly deprived Plaintiffs of their constitutional rights of due process and to a fair trial.

198. Plaintiffs are entitled to a declaratory judgment that the final judgment entered by Defendant Judge Walker on August 26, 1982, and all other orders entered by Defendant Judge Walker in cause Nos. 82-5742-I and 79-9623-L are void and of no force and effect.

WHEREFORE, Plaintiffs demand that the Court adjudge: that the effect of the Bankruptcy Court's judgment rendered by the United States Bankruptcy Court, Cause Nos. BK 379-00664 G, BK 379-00665 G on the docket of said court constitutes a complete and conclusive bar against the assertions made by the Defendants in Cause Nos. 82-5742-I and 79-9623-1, and/or that the final judgment and all other orders entered by Defendant Judge Walker are void and of no force and effect and/or order further equitable and injunctive relief as this court deems appropriate and necessary to correct the conditions complained of herein.

PLAINTIFFS' SECOND AMENDED COMPLAINT AND APPLICATION FOR DELCARATORY AND INJUNCTIVE RELIEF, p. 64 and p. 65

APPENDIX F

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
F I L E D
APR 18 1985
NANCY HALL DOHERTY, CLERK
By /s/ illegible
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

APR 22 REC'D

PAT S. HOLLOWAY, et al.	*	
	*	
Plaintiffs	*	
v.	*	Civil Action No.
	*	3-82-1846-H
JUDGE DEE BROWN	*	
WALKER, et al.	*	
	*	
Defendants	*	

MEMORANDUM OPINION AND ORDER

This case is before the Court on Defendant R. Jack Ayres, Jr.'s Motion to Clarify, Motion to Reconsider and in the Alternative, Motion to Certify, filed March 21, 1985, and Plaintiffs' Response, filed April 12, 1985.

By Memorandum Opinion and Order of March 11, 1985, the Court granted Defendant Ayres' Motion for Summary Judgment as it related to Plaintiffs' procedural due

process claim and denied it as it addressed a substantive due process claim for the deprivation of a constitutional right to a fair trial.

Motion to Reconsider

Defendant Ayres seeks the reconsideration of the previous order and the grant of a total summary judgment. He argues that the claim of a trial before a biased decision-maker is one of procedural, and not substantive, due process. Upon further examination, the Court agrees. * * * *

* * * * appears once in the fourteenth amendment, can be simultaneously violated and not violated by the same acts. Needless to say, any purpose served by *Hudson* would be eviscerated by such an arrangement.

Without expressing an opinion on the merits of the allegations in this case, the availability of a substantive due process remedy will encourage a staggering volume of constitutional challenges by disgruntled civil litigants, from whom charges of bias, bad faith and other opprobrious epithets of malice are commonplace. *Raskiewicz v. Town of New Boston*, 754 F.2d 38, 44 (1st Cir. 1985). Such claims are better relegated to the normal corrective processes of the state courts.

Pendent Claims

Plaintiffs also assert several pendent claims, including allegations of negligent and wrongful receivership. The viability of many of these causes of action asserted by Plaintiffs is in serious doubt given recent actions by the state courts on Plaintiffs' appeal. In *United Mine Workers v. Gibbs*, the Supreme Court stated that "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." 383 U.S. 715, 726 (1966). This rule has been followed often in this circuit. *See Tinker v. DeMaria Porsche-Audi, Inc.*, 632 F.2d 520 (5th Cir. 1980); *Daniels v. All Steel Equipment, Inc.*, 590 F.2d 111 (5th Cir. 1979). This general rule, however, is not absolute. the oft-times divergent goals of state and federal comity, judicial economy, convenience and fairness should be considered in exercising what is a matter of discretion. *Ingram Corp. v. J. Ray McDermott & Co., Inc.*, 698 F.2d 1295, 1319 (5th Cir. 1983).

The court is of the opinion that the viable pendent claims, if any, should be heard in the state courts. The ultimate determination of the ownership of the property underlying the claims will eventually come from the state courts. The federal courts have previously indicated a desire to abstain from adjudicating the validity and propriety of the actions of the receiver appointed by the state court. *See Humble Exploration Company, Inc. v. The Browning Interests*, Adv. No. 382-0864-G (Order of October 5, 1982). No motions addressed to the substance of the pendent claims have been filed or considered by this Court. An adequate state forum is available.

The Court finds that the pendent claims were not filed in federal court "in intentional disregard of jurisdiction", *see* Tex.Rev.Civ.Stat.Ann. art. 5539a (Vernon 1958). Article 5539a governs the refiling in state court and is liberally construed in favor of preserving Plaintiffs' claims. *Griffen v. Big Spring, I.S.D.*, 706 F.2d 645, 650-51 (5th Cir. 1983), *cert. denied*, 104 S.Ct. 525 (1983).

Accordingly, the court is of the opinion that Defendant Ayres' Motion to Reconsider should be and hereby is, GRANTED; the Court's Memorandum Opinion and Order of March 11, 1985, is MODIFIED consistent with this Opinion; all Defendants' Motions for Summary Judgment are GRANTED and Plaintiffs' claims under 42 U.S.C. § 1983 are DISMISSED WITH PREJUDICE; and Plaintiffs' pendent claims are DISMISSED WITHOUT PREJUDICE to the timely refiling of same in state court.

SO ORDERED.

DATED: April 18, 1985.

/s/ illegible
BAREFOOT SANDERS
UNITED STATES DISTRICT JUDGE

APPENDIX G

No. 8066

BENNIE C. JAEHNE; HERMAN JAEHNE; TED R. FERGUSON; JOE W. HOLT; FLOJO TRADING CORPORATION; MARCY HOLLOWAY; CATHERINE GAIL HOLLOWAY; PATRICK LEE HOLLOWAY; BRENDA HOLLOWAY; PAT S. HOLLOWAY as Trustee of CATHERINE GAIL HOLLOWAY; PAT S. HOLLOWAY as Trustee of of PATRICK LEE HOLLOWAY; PAT S. HOLLOWAY; DON NAVARRO,as Trustee of PAT S. HOLLOWAY, HUMBLE EXPLORATION COMPANY, INC.(Now HECI Exploration Company) and STERLING PIPELINE COMPANY	)	IN THE DISTRICT COURT OF
Plaintiffs,	)	
v.	)	LEE COUNTY, TEXAS
MICHAEL G. STARNES, Individually and as Co-Independent Executor of the Estate of William W. Browning, Jr., Deceased, and as Trustee for the	)	

BROWNING CHILDRENS' TRUSTS; JANE H. BROWNING, Individually and as Co-Independent Executrix and as Co-Trustee of the Estate of W. BROWNING, JR., deceased; G.H. KELSOE, JR., and R. JACK AYRES, JR., Individually and as a professional corporation; CATHERINE AGNES LAND STARNES; KATHRYN LOUISE BROWNING COOK; AVERILLE ADAMS BROWNING; WILLIAM WEBB BROWNING III; ROBERT HOLLAND BROWNING; and WINIFRED FALLON BROWNING; DEE BROWN WALKER; JOHN WRIGHT; WHITLEY R. SESSIONS; J.R. HURT; ERIC MILLER, and SOUTHWEST MEDIA CORPORATION	)	
Defendants.	)	21ST JUDICIAL DISTRICT

FILED
JUN 17 1985 2:58 PM
/s/ illegible
DISTRICT CLERK
LEE COUNTY, TEXAS
BY /s/ illegible
DEPUTY

PLAINTIFFS' ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW BENNIE C. JAEHNE, HERMAN JAEHNE, TED R. FERGUSON, JOE W. HOLT, FLOJO TRADING CORPORATION, MARCY HOLLOWAY, CATHERINE GAIL HOLLOWAY, PATRICK LEE HOLLOWAY, BRENDA HOLLOWAY, PAT S. HOLLOWAY as Trustee of CATHERINE GAIL HOLLOWAY, PAT S. HOLLOWAY as Trustee of PATRICK LEE HOLLOWAY, PAT S. HOLLOWAY (hereinafter "Holloway"). DON NAVARRO, as trustee of PAT S. HOLLOWAY (hereinafter called the "Trustee", HUMBLE EXPLORATION COMPANY, INC. (now HECI Exploration Company but hereinafter called "Humble") and STERLING PIPELINE COMPANY

PLAINTIFFS' ORIGINAL PETITION - p. 1

Count Three

In Count Three Marcy Holloway, Pat S. Holloway as Trustee and as Guardian for Catherine Gail Holloway, and Pat S. Holloway as Trustee and as Guardian for Patrick Lee Holloway, who also were *not* named or made parties to any of the proceedings which resulted in the Void Judgment in favor of the Browning Interests seek to quiet their title to and to remove the encumbrance of the Void Judgment from, real

property and estates and interests in real property located in Lee, Washington, and Fayette Counties, Texas, consisting primarily of all overriding royalty interests and working interests in oil and gas leases covering lands in such counties which were sold and assigned to them by Humble and which stand of record in their names in such counties. They also seek recovery of their damages.

Such Plaintiffs' titles have been clouded by the Browning Interests' claims based on the Void Judgment to which such Plaintiffs were never made parties.

Count Four

In Count Four Holloway, Brenda Holloway and the Trustee seek to recover title to, and to quiet title to and remove encumbrance from, certain real property interests in Lee County, Texas and elsewhere as against the Browning Interests including (i) the 805 acre farm in Lee County, Texas, 200 acres of which is claimed as the homestead of Holloway and wife Brenda Holloway, (ii) all overriding royalty interests and working interests in Lee County, Texas and elsewhere conveyed by Humble to Holloway or the Trustee, and (iii) the real property interests devised to Holloway by his father. Brenda Holloway claims homestead rights in the 200 acre homestead and community property interests in all working interests conveyed by Humble to the Trustee. The Trustee does not acknowledge the homestead rights of Holloway and Brenda Holloway. Brenda Holloway was not named as a defendant or otherwise made a party to the Void Judgment which is void as to her for such reason as well as the other grounds for relief asserted by her and Holloway.

Count Five

In Court Five, Plaintiffs Brenda Holloway and Pat S. Holloway seek, pursuant to Sections 23.001 and 23.002 of the Texas Property Code and Section 5.42 of the Texas Family Code, a partition of community real property interests located in Lee County, Texas and elsewhere consisting of all oil and gas lease working interests acquired by the Trustee from Humble since November, 1982 with commingled and community property funds of Brenda Holloway and Pat S. Holloway or his estate. Herein Plaintiff Brenda Holloway also seeks to quiet her title to all real property interests to be partitioned to her by the Court as against all claims of the Browning Interests thereto, including but not limited to those based on the Void Judgment. The Trustee is joined as an involuntary plaintiff in this count to assure that the estate of Pat S. Holloway as well as the Browning Interests will be bound by the judgment of partition to be rendered herein.

Count Six

In Count Six Pat S. Holloway and the Trustee, as the solle legal and beneficial holder or holders al all voting rights in all outstanding stock of Humble and Sterling, seek to recover for the use and benefit of Humble and Sterling as against the Browning Interests the title to, and to quiet title to, and remove encumbrance from, real property and estates and interests * * * *

Count Fifteen

In Count Fifteen all Plaintiffs seek a declaratory judgment that the Void Judgment is a void judgment and, that the underlying claims of the Browning Interests are without merit as to any of Plaintiffs. Certain Plaintiffs also seek herein ancillary injunctive relief.

V.
GROUNDS FOR RELIEF

1. The following Plaintiffs were never served with process, named as defendants, or in any other way made parties in the Dallas County lawsuit which resulted in the Void Judgment:

Bennie C. Jaehne
Herman Jaehne
Joe W. Holt
Flojo Trading Corporation
Ted R. Ferguson
Brenda Holloway
Marcy Holloway
Catherine Gail Holloway
Patrick Lee Holloway
Pat S. Holloway, Trustee for Catherine Gail Holloway
Pat S. Holloway, Trustee for Patrick Lee Holloway

None of the foregoing Plaintiffs except Flojo Trading Corporation was even named in the Void Judgment. Therefore, the Void Judgment is void as to them upon such grounds, in addition to the other grounds for relief set forth below. Both the Void Judgment and the underlying claims of the Browning Interests on which the Void Judgment is based have created clouds and encumbrances on all of the

titles of these Plaintiffs, and have caused them damages, for which they seek relief herein on all grounds for relief set forth herein.

2. Throughout the proceedings resulting in the Void Judgment, Plaintiffs Holloway, Humble and Sterling were deprived of procedural due process under Article 1, Section 19, of the Texas Constitution, by being deprived of: (i) advance notice of hearings; (ii) the opportunity to appear and argue to the court before entry of orders; (iii) the opportunity to be represented by their counsel; (iv) the opportunity to present their own witnesses and evidence; (v) the opportunity to cross-examine witnesses; (vi) sufficient time to prepare for hearings and the trial of the case; (vii) access to their own records necessary to present their defense; and (viii) other fundamental rights of procedural due process. As a result of such violations and deprivations of due process as guaranteed by the Texas Constitution, the Void Judgment is void and a nullity and subject to collateral attack in this suit.

3. Throughout the proceedings, both prior to and during trial and in the entry of the Void Judgment, former Judge Dee Brown Walker acted with bias and partiality against Plaintiffs Holloway and Humble and totally deprived them of a fair trial, or even any vestige of a fair trial. Defendant Walker was in fact biased and in fact did not give Plaintiffs a fair trial. Plaintiffs were entitled to a fair trial before an unbiased and impartial judge as a matter of constitutional due process under both the Due Process Clause of the Texas Constitution, Article 1, Section 19, and under Article V, Section 11, of the Texas Constitution and Article 15 of the Texas Revised Civil Statutes, both as implemented by Canon 3C of the Texas Code of Judicial Conduct. By reason of his bias and partiality, Defendant Walker was disqualified and had no capacity to act as judge in the case

or to render judgment therein. Therefore, the Judgment rendered by him is void and a nullity, and subject to collateral attack in this suit.

4. In addition to being biased and failing to give Plaintiffs a fair trial, Defendant Walker and the other Defendants entered into an illegal conspiracy among themselves to deprive Holloway of, and pursuant to such conspiracy did deprive him of, all his worldly belongings, including his residence in Dallas, his home and farm in Lee County, Texas; all real property devised to him by his father; his two companies; Humble and Sterling, and all of his personal oil and gas properties, and other real estate and property he has accumulated over his lifetime. In addition to divesting Holloway of all his property, the Void Judgment rendered a money judgment against him in the amount of $72,000,000.00. Pursuant to such illegal conspiracy, Judge Walker in fact and in law acted as counsel and as agent of and for the other Defendants while purporting to be a judge in this case, in violation of Section 11 of Article V of the Texas constitution. By reason thereof, Judge Walker was disqualified to act as judge in the case or to render judgment therein; hence, the proceedings were totally without due process of law; and the Void Judgment is void and a nullity, and therefore subject to collateral attack in this suit.

5. The Void Judgment was obtained by the fraud and other wrongful acts of the Defendants which prevented Plaintiffs Holloway, Humble and Sterling from presenting their defenses, in fraud of such plaintiffs' rights and in violation of such Plaintiffs' constitutional rights of procedural due process under the Due Process Clause of the Texas Constitution. By reason thereof the Void Judgment is void and a nullity and subject to collateral attack in this suit.

PLAINTIFFS' ORIGINAL PETITION-p. 13, p. 14, & p. 15

APPENDIX H

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
JUN 28 1985
NANCY HALL DOHERTY, CLERK
BY /s/ illegible
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JANE H. BROWNING, et al.	*	
Plaintiffs	*	
v.	*	Civil Action No.
	*	3-83-0380-H
DON NAVARRO, et al.	*	
Defendants	*	

MEMORANDUM OPINION AND ORDER

This case is before the court on Plaintiffs' Second Motion for Order in Aid of Partial Judgment, filed May 10, 1985; Defendant Holloway's Response, filed May 17, 1985; Response of Defendant Holloway to Court's Order, filed June 6, 1985; Plaintiffs' Report of Conference and Amended Second Motion, filed June 7, 1985; Trustee's Report of Conference, filed June 10, 1985; Motion of Defendant Holloway to Reconsider, or in the Alternative to Clarify its Opinion or in the Alternative to Certify, filed June 11, 1985; Defendant Holloway's Supplemental Brief, filed June 18, 1985; Plaintiffs' Reply to Motion for Reconsideration, filed

June 21, 1985; and Defendant Holloway's Response to Plaintiffs' Amended Second Motion, filed June 24, 1985.

As usual, the waters in this misbegotten kettle boil over. Once again, the Court will attempt to address the issues that cause the consternation.

On March 21, 1985, this Court filed a Memorandum Opinion and Order, addressing Motions for Summary Judgment after remand from the United States Court of Appeals for the Fifth Circuit, 743 F.2d 1069 (5th Cir. 1984). The issue before the Court was the appropriateness of the only relief that Plaintiffs sought at that time -- the provision by the Trustee of adequate security for Plaintiffs' state court judgment during appeal or, failing that, the turnover of the property subject to the judgment. At that time, the court granted Plaintiffs' Motion, holding that they were entitled to either security pursuant to state law or the fruits of the judgment.

Although the Trustee vigorously opposed such relief in the past, he did not seek leave to appeal this ruling, but rather indicated his desire to facilitate an orderly turnover of the property under his supervision to Plaintiffs pursuant to the state court judgment. A partial judgment was entered by the Court on April 2, 1985, reflecting the parties' understanding. The Trustee and Plaintiffs subsequently reached agreement on the form of an additional order in aid of judgment, covering the turnover of additional properties, which was filed by the Court on April 25, 1985.

Plaintiffs have now moved for a Second Order in Aid of Partial Judgment, seeking the turnover of certain real property (Holloway Ranch; 5840 Westgrove, Dallas; Pecan Farms; Baca County, Colorado Interests; Interest in Hinds Survey, Lee County), six vehicles and a vast quantity of oil

and gas properties detailed in the Schedules appended to the proposed order. The Trustee concurs with the form of the proposed order.

Defendant Holloway vigorously protests the turnover of certain property in Plaintiffs' Second Motion as not being covered by the state court judgment or as being subject to a community property/constructive trust claim of his wife Brenda. On June 17, 1985, Holloway commenced litigation in the 21st Judicial District Court of Lee County, styled *Bennie C. Haehne, et al. v. Starnes*, No. 8066 and secured a Temporary Restraining Order purporting to prohibit any of the plaintiffs herein from receiving any property from the Trustee, named as an involuntary plaintiff. It appears that the property covered by the TRO is that sought to be turned over by further order of this Court. The ultimate relief sought in the *Jaehne* litigation is the recovery of title by certain persons allegedly not made parties to the earlier state court action, the partition of certain community property interests, damages for wrongful receiverships, damages for wrongful enforcement of the judgment, a declaratory judgment that Holloway and Humble owe nothing to the Brownings and that the state court judgment is void, damages for malicious prosecution, slander, libel and invasion of privacy.

This Court has authorized and directed the Trustee to turn over to Plaintiffs all of the property covered by the state court judgment, in lieu of posting a supersedeas bond. The Court will not, however, function as Sheriff in directing the execution on various items of property. If the Trustee feels confident, as he indicates, that certain property can be safely conveyed as being clearly subject to the state court judgment, he should so proceed. This Court will not, however, immunize the parties from any errors in judgment.

Resolution of the issues raised by Holloway in *Jaehne* regarding conflicting title may be an arduous and lengthy process involving parties beyond those to the instant suit. The issues to be resolved are largely local in character. The determination by this Court of the identity of property within the scope of the state court judgment would involve a grueling expedition by a court with only the most tenuous jurisdictional basis. Accordingly, the Court hereby **ABSTAINS** in favor of the courts of the State of Texas from the resolution of any issues regarding the identity of or conflicting claims to title to assets subject to a constructive trust by the Amended Judgment signed November 11, 1982, by the 162nd Judicial District Court of Dallas County, Texas in Cause No. 79-9623-I, styled *Jane H. Browning, et al. v. Pat S. Holloway, et al.* *See Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940).

To summarize, the Trustee is directed to turn over and deliver to Plaintiffs all remaining assets in the possession of the Trustee, considered by the Trustee and Plaintiffs to be subject to the constructive trust imposed by the state court. To the extent that there are disputes as to the identity of or conflicting claims to any such property, the claimants may proceed in a court of competent jurisdiction to adjudicate title to said property in the possession of Plaintiffs. Accordingly,

* * *

Accordingly, all relief not heretofore granted is **DENIED**, and this case is **DISMISSED**.

SO ORDERED.

DATED: June 28, 1985.

/s/ Barefoot Sanders
BAREFOOT SANDERS
UNITED STATES DISTRICT JUDGE

Certified a true copy of an instrument
on file in my office on 7/11/85
NANCY HALL DOHERTY, Clerk, U.S. District
Court, Northern District of Texas
By /s/ illegible Deputy

APPENDIX I

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
F I L E D
JUL 16 1985
NANCY HALL DOHERTY, CLERK
BY /s/ illegible
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JANE H. BROWNING, et al.	*	
Plaintiffs	*	
v.	*	Civil Action No.
	*	3-83-0380-H
DON NAVARRO, et al.	*	
Defendants	*	

MEMORANDUM OPINION AND ORDER

This case is before the Court on Plaintiffs' Motion to Amend Second Order, to Reconsider, for Partial New Trial and for Injunctive Relief, filed July 5, 1985, and the Trustee's Reply, filed July 9, 1985.

Upon consideration of the submissions of the parties, the Court is of the opinion that Plaintiffs' Motion should be, and hereby is, **GRANTED** as follows.

The paragraph on page nine of the June 28, 1985, Memorandum Opinion and Order (beginning "Nor can . . .") is **DELETED**, and the **DISMISSAL** of the case is hereby

VACATED. A trial setting and associated deadlines on Plaintiffs' damages claims against the Trustee will be forthcoming shortly.

On page three of the same Opinion, the paragraph beginning "This Court has authorized . . ." is **DELETED**, and the following language is substituted:

This Court has authorized and directed the Trustee to turn over to Plaintiffs all of the property covered by the state court judgment in lieu of posting a supersedeas bond. The Trustee has identified those items of property in Schedules 1 and 2, attached to the Second Order, as being covered by the state court judgment. He is thus directed to promptly execute and deliver the necessary documents to accomplish the turnover of these interests.

Of course, this Order does not foreclose any rights of any individuals not parties to this action who may assert superior title to or interest in any of the property. Such claims may be asserted against the Browning Interests as readily as against the Trustee. Likewise, if the Trustee or Holloway should subsequently discover any property which is, for reasons other than the validity of the state court judgment, rightfully that of the Estate or of the debtor, this order does not foreclose litigation to resolve that issue. Such claims have not been previously raised in this forum and the Court sees no reason why any such litigation should be conducted here. The Court is not purporting to vest Plaintiffs with clear fee simple title, but only with possession of the assets subject to their judgment.

The fourth sentence of the first full paragraph on page four is **AMENDED** to read: "Accordingly, this Court will **ABSTAIN** in favor of the courts of the State of Texas from the resolution of any issues regarding conflicting claims to

title to assets subject to a constructive trust by the Amended Judgment signed November 11, 1982, by the 162nd Judicial District Court of Dallas County, Texas, in Cause No. 79-9623-I, styled *Jane H. Browning, et al. v. Pat S. Holloway, et al.* on the basis of claims other than those adjudicated in this Court by parties to this action. *See Thompson v. Magnolia Petroleum Co.*, 309 U.S. 470 (1940).

SO ORDERED.

DATED: July 16, 1985.

/s/ Barefoot Sanders
BAREFOOT SANDERS
UNITED STATES DISTRICT JUDGE

APPENDIX J

PLAINTIFFS' AMENDED THIRD MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT THEREOF

FILED: OCTOBER 19, 1990

(Stamp Illegible)

NO. 86-7704-I
NO. 89-6582-I
NO. 89-10016-I

PAT S. HOLLOWAY, and BRENDA HOLLOWAY, Individually, HUMBLE EXPLORATION COMPANY, INC., STERLING PIPELINE COMPANY, FLOJO TRADING CORPORATION AND ROBBIE HOLLOWAY	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	
v.	§	
MICHAEL G. STARNES, Individually, and as Co-Independent Executor and Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased, and as Trustee of the BROWNING CHILDRENS' TRUSTS and as Special Trustee;	§	
JANE H. BROWNING, Individually and as Co-Independent Executrix and	§	DALLAS COUNTY, TEXAS

Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased; INTERFIRST BANK DALLAS, N.A., Individually and as Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased; CATHERINE AGNES LAND STARNES; KATHRYN LOUISE BROWNING COOK; AVERILLE ADAMS BROWNING; WILLIAM WEBB BROWNING III; ROBERT HOLLAND BROWNING; WINIFRED FALLON BROWNING VAUGHN; R. JACK AYRES, JR., Individually and LAW OFFICES OF R. JACK AYRES, JR., P.C., a corporation	§	162ND JUDICIAL
Defendants.	§	DISTRICT

PLAINTIFFS' AMENDED THIRD MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT THEREOF

TO THE HONORABLE JUDGE OF SAID COURT:

Now come Plaintiffs Pat S. Holloway and Brenda Holloway with this their Amended Third Motion for Summary Judgment and Brief in Support thereof, by which they would show the Court as follows:

I.

The Amended Judgment of November 11, 1982, in Cause No. 79-9623-I in the 162nd Judicial District Court of Dallas, Texas, styled *Jane H. Browning, et al. v. Pat S.*

Holloway, et al., purports to impose a constructive trust upon 100% of the issued and outstanding shares of stock of Flojo Trading Corporation, purports to impose a constructive trust upon and award legal and equitable title to all property and mineral interests owned, controlled, or held by Flojo Trading Corporation, purports to impose a constructive trust upon all property, assets, and other things of value owned, controlled, held or claimed by Flojo Trading Corporation, and further purports to impose joint and several liability upon Flojo Trading Corporation from damages in the amount of SEVENTY MILLION DOLLARS ($70,000,000.00)

II.

Flojo Trading Corporation was not named as a defendant, was not served with citation or other process, and did not appear in any fashion at any time prior to entry of judgment in Cause No. 79-9623-I in the 162nd Judicial District court of Dallas County, Texas. Said judgment in Cause No. 79-8623-I does not recite that Flojo Trading Corporation was a defendant in that cause.

III.

The legal and beneficial stockholders of Flojo Trading Corporation were not named as defendants, were not served with citation or other process, and did not appear in any fashion at any time prior to entry of judgment in Cause No. 79-9623-I in the 162nd Judicial District Court of Dallas County, Texas. Said judgment in Cause No. 79-9623-I does not recite that any of the legal and beneficial stockholders of Flojo Trading Corporation were defendants in that cause.

IV.

The judgment in Cause No. 79-9623-I is therefore void as to Flojo Trading Corporation. Insofar as the judgment imposes joint liability and is indivisible, it is also void as to the defendants in Cause No. 79-9623-I, specifically Plaintiff in this cause Pat S. Holloway.

V.

In support of this motion, and pursuant to Rule 201 of the Texas Rules of Civil Evidence, Plaintiffs request that the Court take judicial notice of the Court's file in Cause No. 79-9623-I, styled *Jane H. Browning, et al. v. Pat S. Holloway, et al.* Plaintiffs further adopt and incorporate herein by reference the affidavit of Joe W. Holt which was previously attached to and incorporated in Plaintiffs' Third Motion for Partial Summary Judgment and Brief in this cause. A copy of said affidavit of Joe W. Holt is attached hereto as Appendix 1.

VI.

In further support of this motion, Plaintiffs submit the following authorities.

In a direct attack on a judgment, such as the Bill of Review brought in this cause, no presumptions are indulged in support of the judgment's validity. *Fender v. Moss*, 696 S.W.2d 410 (Tex. App. - Dallas 1985). As disclosed by the summary judgment evidence, namely the Court's file in Cause No. 79-9623-I and the affidavit of Joe W. Holt, Flojo Trading Corporation was never made a party, either by citation or appearance, to Cause No. 79-9623-I prior to entry of the Amended Judgment dated November 11, 1982. The

judgment against Flojo Trading Corporation is therefore void. See *Peralta v. Heights Medical Center*, 485 U.S. 80, 108 S.Ct. 896 (1988).

The Supreme Court of Texas held over a century ago that if a judgment is void as against one defendant and is indivisible in nature, then it is necessarily void as against other defendants named in the judgment. *Hulme v. Janes, Adm'r*, 6 Tex. 242, 55 Am. Dec. 774 (1851). That holding was followed in *Long v. Garnett*, 45 Tex. 400 (1876), as it has been consistently followed in the years since. See, e.g. *McLaren Rubber Co. v. Williams Auto Supply*, 81 S.W.2d 255 (Tex. Civ. App. - Eastland 1934).

The rationale, as applicable here, for such a holding is that a judgment of joint liability cannot be rendered in the absence of any party sought to be held liable. *Zodiac Corporation v. General Electric Credit Corporation*, 566 S.W.2d 341, 346 (Tex. Civ. App. - Tyler 1978). Put another way, if a trial court has not acquired jurisdiction over all of the parties affected by its judgment, then the judgment is void. *Danner v. Aetna Life Insurance Co.*, 496 S.W.2d 950 (Tex. Civ. App.- Ft. Worth 1973).

The judgment in Cause No. 79-9623-I as to joint and several liability for the $70,000,000.00 damage award is necessarily indivisible as to Flojo Trading Corporation and the other named defendants, including Pat S. Holloway. Since that judgment is void as to Flojo Trading Corporation, it is also necessarily void as to the other named defendants, including Pat S. Holloway. Likewise, the imposition of a constructive trust over the property, mineral interests, and other assets of the defendants, including Flojo Trading Corporation, is necessarily indivisible and therefore void as to all defendants in that cause, including Pat S. Holloway.

PREMISES, CONSIDERED, Plaintiffs respectfully pray the Court enter judgment that the Amended Judgment of November 11, 1982 in Cause No. 79-9623-I in the 162nd Judicial District Court of Dallas County, Texas, is void.

Respectfully submitted,

MINTON, BURTON, FOSTER & COLLINS
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(512) 476-4873

/s/ Scott A. Young
for Roy Q. Minton
State Bar No. 14196000

MCCOLL & MCCOLLOCH
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701 Commerce Street
Dallas, Texas 75202
(214) 744-5044

ATTORNEYS FOR PLAINTIFFS
PAT S. HOLLOWAY AND
BRENDA HOLLOWAY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Plaintiffs' Amended Third Motion for Summary Judgment and Brief in Support Thereof has been sent by Federal Express to Mr. R. Jack Ayres and Mr. Thomas V. Murto, III, Law Officers of R. Jack Ayres, Jr., 4350 Beltway Drive, Dallas, Texas 75244-3110 and by certified mail, return receipt requested to the following counsel of record on this the 18th day of October, 1990:

Mr. John B. Kyle
Jackson & Walker
901 Main Street
Suite 6000
Dallas, Texas 75202

Mr. Edwin E. Wright, III
Stradley, Schmidt & Wright
One Campbell Centre
Dallas, Texas 75206

Ms. Robbie Holloway
3811 Turtle Creek
Suite 1100
Dallas, Texas 75219

/s/ Scott A. Young
for Roy Q. Minton

AFFIDAVIT OF JOE W. HOLT

STATE OF TEXAS §
§
COUNTY OF DALLAS §

BEFORE ME the undersigned authority on this day personally appeared Joe W. Holt who, being by me first duly sworn, on oath stated as follows:

1. My name is Joe W. Holt. I am over the age of 21 years and of sound mind, and I have never been convicted of a felony or other crime involving moral turpitude. I have personal knowledge of all matters stated herein and am competent to testify thereto.

2. At all times during 1982 I was both President of, and the registered agent for service of process for, Flojo Trading Corporation, a Texas corporation incorporated in 1979. I have been the only registered agent for service of process for such corporation since its incorporation.

3. Flojo Trading Corporation was neither named as a party or served with process in any way in either the case of *Jane H. Browning, et al. v. Pat S. Holloway, et al.*, Cause No. 79-9623-I or in the case of *Fairway Land Company, Inc. et al. v. Humble Exploration Company, Inc., et al.*, No. 82-5742-I in which various judgments were entered in the 162nd Judicial District Court of Dallas County, Texas.

4. Flojo Trading Corporation did not enter any appearance in either of such cases prior to the renditions of judgments therein nor was it represented by counsel in either of such cases in any of the proceedings prior to judgments therein.

5. At all relevant times the sole legal and beneficial stockholders of Flojo Trading Corporation were Bennie Jaehne, Herman Jaehne, Charlie Adams, Dean A. Johnson, III and myself. None of us was named as a Defendant in *Browning v. Holloway*, none of us was served with process therein, none of us appeared in such case and none of us was represented by counsel in such case.

Further affiant sayeth not.

/s/ Joe W. Holt
Joe W. Holt

SUBSCRIBED AND SWORN TO Before me on this the 17 day of September, 1986.

/s/ D.K. Jones Sallee

Notary Public, State of Texas

My Commission Expires: 11-25-1989

Printed Name of Notary: D.K. Jones Sallee

ENDORSEMENT ON INSTRUMENT NO. 86-7704-I
Pat S. Holloway, et al
vs.
Michael G. Starnes, et al
PLAINTIFFS' AMENDED THIRD MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT THEREOF
Filed: October 19, 1990 BILL LONG, District Clerk
Dallas County, Texas /s/ _____,Deputy

APPENDIX I